Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-1896

No. ——

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

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INDEX

Page

TABLE OF AUTHORITIES ii

I. OPINION BELOW 2

II. JURISDICTION 3

III. QUESTIONS PRESENTED 4

IV. CONSTITUTIONAL PROVISIONS STATUTE AND REGULATIONS INVOLVED 6

V. STATEMENT OF THE CASE 6

VI. REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED 11

VII. CONCLUSION 22

TABLE OF AUTHORITIES

CASES:

Ashland Oil & Refining Co. v. F.P.C., 421 F.2d 17 (6th Cir. 1970) 12

California v. Southland Royalty Co., 436 U.S. 519 (1978) 11-12

Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581 (1945) 11

El Paso Natural Gas Co., 29 F.P.C. 1175 (1963) 19

Far Eastern Conference v. United States, 342 U.S. 570 (1952) 12

F.P.C. v. Louisiana Power & Light Co., 406 U.S. 621 (1972) 11, 12

Hall v. Arkansas Louisiana Gas Co., 359 So.2d 255 (Ct. App. La. 1978) 2, 4, 8

Hall v. Arkansas Louisiana Gas Co., 368 So.2d 984 (La. 1979) 3, 4, 8

Page

Hall v. Arkansas Louisiana Gas Co., 379 So.2d 1142 (Ct. App. La. 1980) ..... passim

Mobil Oil Corp. v. F.P.C., 463 F.2d 256 (D.C. Cir. 1971), cert. den. sub nom Mobil Oil Corp. v. Matzen, 406 U.S. 976 (1972) 12

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 11, 12, 13

Northern Natural Gas Co. v. Kansas Corporation Commission, 372 U.S. 84 (1963) 11, 12, 13

Other Southwest Area Rate Order, F.P.C. Op. No. 607, 46 F.P.C. 900 (1971) 6, 16-19

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 20

Socony Mobil Oil Co. v. Brooklyn Union Gas Co., 299 F.2d 692 (5th Cir. 1962), cert. den. 371 U.S. 887 (1962) 12

Texas Oil & Gas Corp. v. Valley Gas Transmission, Inc., 608 F. 2d 231 (5th Cir. 1979) 12

Texas & Pacific R. Co. v. American Tie and Timber Co., 234 U.S. 138 (1914) 12

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) 12

United States v. Western Pacific R. Co., 352 U.S. 59 (1956) 12

United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932) 12

STATUTES AND REGULATIONS:

Department of Energy Organization Act, 42 U.S.C. 7172(a)(1)(C), (D), (E) and (F) 5

Natural Gas Act
15 U.S.C. 717, et seq. ..... passim
15 U.S.C. 717c ..... passim

Code of Federal Regulations, Title 18,
§§ 154.92-95 and 157.40 6
§ 154.109a 6, 16-19

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ARKANSAS LOUISIANA GAS COMPANY prays that a Writ of Certiorari issue to review the judgment and decree of the Court of Appeal, Second Circuit, State of Louisiana, entered in this cause on January 22, 1980,[1] affirming the judgment of the First Judicial District Court of Louisiana in and for Caddo Parish rendered on May 17, 1979.

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[1] The Supreme Court of Louisiana on May 2, 1980 denied a petition to review this judgment.

I. OPINION BELOW

A copy of the opinion and decree of the Court of Appeal to which this petition is addressed is an appendix to this petition, at page 105a; it is reported at 379 So.2d 1142. Petitioner filed an application to the Court of Appeal for rehearing which was denied by order entered on February 29, 1980; see App. p. 118a.

Petitioner timely applied to the Supreme Court of Louisiana for a writ of certiorari, or review, of the judgment of the Court of Appeal, which was denied by an order entered May 2, 1980 (App. p. 119a). Upon such denial the judgments of the Court of Appeal in the suit and of the First Judicial District Court of Louisiana, so far as concerns the law of Louisiana, became final and executory.

On May 9, 1980, the Supreme Court of Louisiana entered an order herein staying the execution of the judgment in the suit pending the filing and prosecution of this petition for certiorari; see App. p. 120a.

The First Judicial District Court filed no opinion as to the matter here at issue; its judgment against Petitioner and in favor of the Respondents severally, aggregating about $2,700,000 plus interest, was entered May 17, 1979; App. p. 121a.

Earlier opinions in the suit in the courts of Louisiana are as follows:

> Opinion and decree of the Court of Appeal, Second Circuit, State of Louisiana, App. 986, p. 2a,[2] reported at 359 So.2d 255, May 1, 1978.

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[2] As explained below (see "Questions Presented," p. 4), there are pending in this Court two earlier petitions for certiorari, Nos. 78-986 and 78-1789; the appendices in the two suits will be referred to herein as "App. 986, p. —," and "App. 1789, p. —." Appendix references in this petition are to "App. p. 104a," et seq.

Orders of the Court of Appeal denying applications of Petitioner and of Respondent, for rehearing, App. 986, p. 21a, June 6, 1978.

Order of the Supreme Court of Louisiana denying Petitioner's application for review of the judgment of the Louisiana Court of Appeal, App. 986, p. 22a, September 22, 1978.

Order of the Supreme Court of Louisiana granting Respondents' application for review of the judgment of the Louisiana Court of Appeal, App. 986, p. 23a, September 22, 1978.

Opinion of the First Judicial District Court of Louisiana in and for Caddo Parish, App. 986, p. 24a, October 14, 1977.

Opinion of the district court denying new trial, App. 986, p. 39a, December 2, 1977.

Judgment of the trial court, App. 986, p. 44a, December 5, 1977.

Opinion and decree of the Supreme Court of Louisiana reversing the May 1, 1978 decree of the Court of Appeal, App. 1789, p. 83a, 368 So.2d 984, March 5, 1979.

Order of the Supreme Court of Louisiana, April 9, 1979, denying rehearing of the decree of March 5, 1979, App. 1789, p. 100a.

II. JURISDICTION

The judgment of the Court of Appeal was entered January 22, 1980, rehearing was denied on February 29, 1980, and under the laws of the State of Louisiana became final when the Supreme Court of Louisiana on May 2, 1980 declined to review the judgment.

The judgment of the Court of Appeal, Second Circuit, State of Louisiana, of which review and reversal are here sought is, under the judicial and procedural systems of Louisiana, a judgment of the highest court of the State of Louisiana in which a decision in this cause could be had. The judgment also is final, within the meaning of the jurisdictional statute, *United States Code,* Title 28, Sec. 1257(3), App. p. 104a.

III. QUESTIONS PRESENTED

The money judgment of which reversal is here sought is the culmination of a procedurally complicated suit, two parts of which are already pending in this Court. In No. 78-986, Petitioner seeks review and reversal of an earlier judgment of the Louisiana Court of Appeal which decided against Petitioner questions of administrative jurisdiction and priority, as well as of liability, and remanded the suit to the trial court on questions of quantum; this Court denied certiorari on October 1, 1979, and after three orders of this Court extending the time for filing petition for rehearing (on October 25, 1979, January 29, 1980, and March 29, 1980) Petitioner, simultaneously with the filing of the present petition, is filing a petition for rehearing of the denial of certiorari in No. 78-986. In No. 78-1789, Petitioner seeks reversal of a judgment of the Supreme Court of Louisiana adjudging liability.

Petitioner submits that, as matters of logic and law, the money judgment here complained of incorporates the erroneous rulings of the Louisiana courts of which Petitioner complains in No. 78-986 and No. 78-1789. We therefore restate here the questions presented in our earlier petitions as well as the question unique to the judgment of which complaint is here made.

(1) Whether the court below erred in failing to refer to the Federal Power Commission ("Commission")[3] the interpretation of the favored nation provision of Respondents' Rate Schedule, whether the favored nation provision was activated, and, if the favored nation provision were activated, the prices that Respondents may collect under the *Natural Gas Act* and the Regulations thereunder.

(2) Whether the Court of Appeal's judgment as to the Small Producer status of Respondents and the computation of their recovery was in accordance with the *Natural Gas Act* and Commission Regulations.

(3) Whether the Supreme Court of Louisiana erred as a matter of jurisdiction and of law in awarding Respondents, as damages for breach of contract, a retroactive price increase for their natural gas sold to Petitioner in interstate commerce for resale, higher than the Respondents' rate on file with the Commission in accordance with the *Natural Gas Act* and Regulations thereunder based upon that court's holding that state law excused Respondents from compliance with federal law and that the Commission would have approved the higher rate had it been filed.

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[3] Under the Department of Energy Organization Act, 42 U.S.C. 7172(a)(1)(C), (D), (E), and (F), the Federal Energy Regulatory Commission ("F.E.R.C.") succeeded to the relevant functions and responsibilities of the former Federal Power Commission ("F.P.C.") on October 1, 1977. The term "Commission" refers to the F.P.C. or the F.E.R.C. as the context indicates.

(4) Assuming a decision adverse to Petitioner on the foregoing three questions, whether the Louisiana courts' determination of the price of gas sold by Respondents to Petitioner under their Rate Schedule exceeds the price permitted under the Commission's Regulations promulgated pursuant to the *Natural Gas Act* and as such is unconstitutional and unlawful.[4]

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Supremacy Clause of the United States Constitution is involved in this proceeding. U.S. Const., Art. VI, Clause 2; App. p. 104a. The federal statute involved is Section 4 of the *Natural Gas Act,* 52 Stat. 822, 15 USC Sec. 717c, and Regulations thereunder of the Commission, *Code of Federal Regulations,* Title 18, Secs. 154.92, 154.93, 154.94, 154.95, 157.40, copies of which are at App. 986, pp. 52a, 54a, 55a and 60a.

Also involved is the *Other Southwest Area Rate Order* of the Commission, *Code of Federal Regulations,* Title 18, Part 154.109a, as added by Commission Opinion No. 607, 46 F.P.C. 900 at page 925 (1971), copy of which is at App. p. 125a.

V. STATEMENT OF THE CASE

We make here a very summary statement of the case and refer the Court to Petitioner's two preceding petitions for certiorari, No. 78-986 and No. 78-1789, for a more detailed description of the case.

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[4] Questions 1 and 2 are specified in No. 78-986 and Question 3 is specified in No. 78-1789. They are also specified here although they are not reargued.

The suit was filed in a Louisiana court in 1974 by Respondents, sellers under a gas sales agreement made with Petitioner in 1952, claiming additional price under an escalation provision of the contract (a "favored nation clause"), which provided it was to be activated if the buyer made purchases from another seller of gas from the same field at a higher price under similar conditions. See Pet. in No. 78-986, pp. 5-6.

In 1961 Petitioner ("Arkla") began production of oil and gas from wells in the Sligo Field drilled on lands owned by the United States and covered by a gas lease held by Arkla and others. Under the lease the government was entitled to a sixth of the value of the product (a value royalty) or at its option to have a sixth of the product in kind. In the case of payment of a value royalty, the United States retained the right to determine the value.

The United States elected to take a value royalty and determined the value at a rate per unit of gas higher than the price per unit of gas then being paid under Arkla's gas purchase contract with Respondents.[5] The trial court, construing the lease, held that the United States owned the product, was selling it to Arkla and that the favored nation clause was thereby triggered; it granted a judgment for the sellers during the period while Respondents, as it held, were "small producers" under the regulations of the Commission and excused Respondents by such regulations from the necessity of filing for the higher rates with the Commission under the *Natural Gas Act.*

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[5] The government also made determination of the value of the production of liquid hydrocarbons.

On appeal the Louisiana Court of Appeal overruled Arkla's contention that the question of interpretation of Respondents' Rate Schedule should have been referred to and decided by the Commission. Although overruling the holding of the district court, that the royalty settlement was a purchase of gas, the appeal court held that the favored nation clause should be construed liberally in favor of the sellers (rather than as appeared to be required by the decisions of this Court, in favor of the gas utility buyer, and thus the consumers of gas) and that, if construed liberally, the words "purchase from another party seller" were broad enough to include payment of value royalty by a mineral lessee.

The court of appeal reversed the district court's judgment as to quantum and remanded the case for the determination of the amount of the judgment, not being satisfied with the calculations of the district court brought before it.

The Supreme Court of Louisiana refused to review that part of the court of appeal's judgment adverse to Arkla and its petition to this Court in No. 78-986 followed. However, that court granted review to Respondents as to that part of the judgment of the court of appeal disqualifying Respondents for the higher price during the time their higher rate had not been on file with the Commission. The court treated the requirements of the *Natural Gas Act* as a contract condition and held that performance would be excused because Respondents were not aware of the government royalty settlement, and thus were prevented from performing the "condition." It also remanded the case to the trial court for a determination of quantum under the rules announced in its opinion.

Respondents, notwithstanding the fact that serious questions of liability were pending in this Court, set the case for trial in the Louisiana district court on remand. The Louisiana courts have uniformly held in this case that Respondents were entitled to an addition to the price already paid in an amount sufficient to bring that price to the level of the unit values paid as royalty to the United States, but have recognized that the contract increases are limited by the Commission's maximum prices. App. 986, p. 36a; App. 1789, p. 94a.

The new trial and the appeal to the court of appeal and on certiorari to the Louisiana Supreme Court involve solely Petitioner's contention that the prices sought by Respondents were substantially higher than the price then permitted by the Commission for similar sales and, therefore, unlawful.[6] The dispute centers on a provision of Section 8(B) of the contract which provided that,

> "The prices hereinabove in this Section 8 provided to be paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquifiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products . . . . The parties take cognizance of the fact that the aforesaid prices hereinabove provided to be paid are $0.0025 per

[6] The question of liability *vel non* was not open to Petitioner in the proceedings on remand.

> MCF higher than would have been provided had Seller retained the right to participate in the recovery of products by such processing operations. . . ."

The favored nation escalation provision of the contract went on to state that "in determining whether a given price is in fact higher than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts . . . ."

Arkla was required by the government in its royalty settlements, in addition to the royalty of 1/6 of the value of the dry gas, to pay a royalty of 1/6 of the value of liquid hydrocarbons extracted from the gas, without any allowance for the cost of extraction. The combination of the two factors of the value of the dry gas and the value of the extracted liquid gave a per Mcf rate for the production from the government lease, gas and liquids, almost double the permissible ceiling rates being allowed at the time by the Commission for wellstream gas.

In the district court Arkla tendered a "Motion to Reopen Record" (App. p. 134a) and a "Statement of Defendant Setting Forth a Summary of Evidence Sought to be Admitted on New Trial" (App. p. 137a), none of which was allowed by the trial court but which was received in the record as a proffer of proof. In further demonstration of Petitioner's reliance on rights under the *Natural Gas Act*, which were denied to it by the Louisiana courts, we quote one of Petitioner's two specifications of error in the court of appeal:

> "The District Court erred in awarding to Plaintiffs a money judgment entitling the Plaintiffs to

> a retroactive per Mcf price increase greatly in excess of the applicable area ceiling rates established by the Federal Energy Regulatory Commission under the *Natural Gas Act,* and in refusing to allow Defendant to adduce testimony to that effect on remand of the case to the District Court."

Likewise, in applying to the Supreme Court of Louisiana for review of the decree of the court of appeal, the only assignment of error specified by Petitioner was as follows:

> "The Court of Appeal erred in affirming the district court's award to plaintiffs of a money judgment entitling the plaintiffs to a retroactive per Mcf price increase greatly in excess of the applicable area ceiling rates established by the Federal Energy Regulatory Commission under the *Natural Gas Act,* and in refusing to allow defendant to adduce testimony to that effect on remand of the case to the district court."

VI. REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

A. The January 22, 1980 judgment of the Louisiana Court of Appeal underscores the multiple errors committed by the Louisiana courts, both as a matter of jurisdiction and law, in attempting to interpret Respondents' Rate Schedule and in awarding Respondents a rate increase. These matters involve the primary and exclusive jurisdiction of the Commission. *Colorado Interstate Gas Co.* v. *F.P.C.,* 324 U.S. 581 (1945); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951); *Northern Natural Gas Co.* v. *Kansas Corporation Commission,* 372 U.S. 84 (1963); *F.P.C.* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972); *California* v. *South-*

land Royalty Co., 436 U.S. 519 (1978); *Ashland Oil & Refining Co.* v. *F.P.C.*, 421 F.2d 17 (6th Cir. 1970); *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F. 2d 692, 695 (5th Cir. 1962), cert. den. 371 U.S. 887 (1962); *Texas Oil & Gas Corp.* v. *Valley Gas Transmission, Inc.*, 608 F.2d 231 (5th Cir. 1979).

This Court has held that only the Commission may set rates for the sale of natural gas for resale in interstate commerce. *Montana Dakota Utilities Co.* v. *Northwestern Public Service Co.*, supra; *Northern Natural Gas Co.* v. *Kansas Corporation Commission*, supra. The Commission has exclusive rate jurisdiction over such sales of natural gas in interstate commerce. Id. The Commission also has primary jurisdiction over interstate gas contracts on file with it as jurisdictional rate schedules. *F.P.C.* v. *Louisiana Power & Light Co.*, supra; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Texas & Pacific R. Co.* v. *American Tie & Timber Co.*, 234 U.S. 138 (1914); *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956); *Far Eastern Conference* v. *United States*, 342 U.S. 570 (1952); *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932). The Louisiana courts' jurisdictional errors have been compounded by their erroneous substantive determinations. These errors include (1) an interpretation of Respondents' Rate Schedule which contravenes federal regulatory law and general contract law [7] and (2) the award of rate increases which violate the "filed rate doc-

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[7] *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (D.C. Cir. 1971), cert. den. sub nom *Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972); Pet. for Reh., No. 78-986 (May 30, 1980).

trine"[8] and the ceiling rates prescribed by the Commission under the Natural Gas Act.[9] These errors are interrelated inasmuch as the state courts' interpretation of Respondents' contract and misunderstanding of federal rate regulation have resulted in the excessive rates complained of in this petition.

The Louisiana Court of Appeal's decision of January 22, 1980 confirms what Petitioner has shown before as reasons why certiorari should be granted in this case. The petitions for writs of certiorari in this case and in Nos. 78-986 and 78-1789 should be granted in order to vindicate the supremacy of federal regulation over state law and in order to protect against similar future incursions by the state courts into areas preempted by federal statute and involving pervasive federal regulation. *Northern Natural Gas Co.* v. *Kansas Corporation Commission,* supra. Indeed, the excessive rates awarded by the state courts should be invalidated by this Court because the ceiling rates established by the Commission under the *Natural Gas Act* are "paramount" under the Supremacy Clause of the Constitution. Id.

In the remainder of this petition, we shall demonstrate beyond cavil that the rate increases awarded by the Louisiana courts, when added to the existing rates, exceed the applicable Commission ceiling rates.

B. The Louisiana Court of Appeal held that Respondents' sale to Arkla was of raw, unprocessed natural gas at wellhead and contained the gaseous con-

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[8] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, supra; Pet. in No. 78-1789.

[9] *Northern Natural Gas Co.* v. *Kansas Corporation Commission*, supra.

stituents thereof which were extractable as liquid hydrocarbons. In its opinion (App. p. 108a) the court said:

> "Under the 1952 gas purchase contract with plaintiffs, Arkla purchased 'production from all wells . . . completed as commercially productive of natural gas' subject to the several terms and conditions of the contract. Section 8 of the contract, subpart D of which contains the most favored nation clause, stipulated the price to be paid for each Mcf of gas delivered to Arkla, but recognized that the stipulated price included an additional $.0025 per Mcf to compensate the seller for the surrender of rights to receive the value of the LHC extracted by processes *after* delivery to Arkla." (Emphasis by the court.)

After quoting in its opinion (App. pp. 109a-10a) the relevant parts of Section 8 of the gas sales contract, the court stated (App. p. 112a) that "... the fact [is] that a portion of the stipulated *Mcf price for gas* under the 1952 contract (¼¢) was for LHC ..." (Emphasis added.) The court said (App. p. 114a):

> "... In the 1952 contract, *gas* includes LHC and the price provisions of the contract *provide a price for both.*" (Emphasis added.)

The following is also quoted from the court's opinion (App. p. 116a):

> "... In effect Arkla paid the Government and the plaintiffs for *wet* gas. The eventual price was determined by the Mcf after extraction of LHC and by the price for the LHC. *The price plaintiffs received for its gas* after extraction of LHC and for the LHC was less than what the government received." (Emphasis added.)

The court said (App. p. 117a):

> "... *Gas* in the 1952 contract includes the LHC." (Emphasis by the court.)

C. The court of appeal's opinion passed only on the interpretation of the contract, and did not address Petitioner's argument and specification of error that the court was granting a price increase unlawful under the *Natural Gas Act*. The court held that the issue on the appeal was one of contract interpretation and sufficiency of evidence, saying in its opinion (App. p. 108a):

> "The central issue in this appeal involves the sufficiency of the evidence used in comparing the difference in the price provisions of the two contracts, one contract being the gas purchase contract in 1952 containing the favored nation clause, and the other being the lease contract with the United States of America in 1961, payments under which have been construed as activating the favored nation clause of the other contract."

The following is quoted from the court's opinion (App. p. 112a):

> "... The crux of this case is not that plaintiffs sold wet gas, but consideration of the purpose of the favored nation clause, the fact that a portion of the stipulated MCF price for gas under the 1952 contract (¼ cent) was for LHC, and the decisions of state and federal authorities in this controversy that the price Arkla paid the United States for LHC is a 'pertinent factor' to be used under Section 8 of the 1952 contract in interpreting the favored nation clause and in determining the difference in the price provisions of the two contracts. The price provisions can be and have been compared."

The court said (Id.):

> "Again we determine that for the purpose of giving effect to the favored nation clause—section 8 of the contract, the higher price the United States began to receive from Arkla in 1961 for gas and for LHC is the basis upon which to assess and measure the amounts plaintiffs should have begun to receive monthly from Arkla in 1961 for its gas and LHC."

The court further stated (App. p. 113a):

> "We reiterate that the purpose of the favored nation or price adjustment clause is to protect the seller under a long-term contract from price discrimination. A contract with favored nations provisions should be interpreted broadly, and not restrictively, to fully effect the provisions."

Later the court stated (App. p. 116a):

> ". . . On the *basic contract question* (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas *and for LHC products severed from its gas.*" (Emphasis added.)

The appeal court's opinion is concerned exclusively with a demonstration that Respondents, as a matter of contract interpretation and evidence, are entitled to the prices found.

D. Respondents concede that their recovery in this case is limited by the maximum price orders of the Commission, specifically FPC Opinion No. 607 (September 21, 1971), as modified by Opinion 607-A (January 17, 1972) which, however, did not change Opinion No. 607 in any way material to this suit.

In fact Respondents introduced the controlling rate order, Opinion No. 607, in evidence as Exhibit P-340 and quoted from it at page 57 of their original brief, although in tabulating the maximum area prices, Respondents failed to quote that part of Opinion No. 607 which requires a reduction of 1¢ per Mcf from the price otherwise established for gas in Northern Louisiana, where the gas is delivered at wellhead. Opinion 607 is not only in evidence in this case, it is reported in Commission Reports Volume 46, at pages 900 to 983; and the relevant parts of the opinion (pages 923 to 930) are in the Appendix, beginning at page 125a.

It is necessary, in order to determine the maximum lawful price for any given sale of gas in North Louisiana, to understand the structure of Opinion 607: the ordering paragraph is numbered 154.109a beginning on page 923. Subpart (A), Subsections (a), (b) and (c) prescribe rates for gas to be sold in the future, beginning January 1, 1972. Subsection (c)(3) is as follows:

> "The applicable area rate shall be adjusted downward, for gas delivered closer to the wellhead than a central point in the field, the tailgate of a plant, a point on buyer's pipeline, or an offshore platform on the buyer's line by the following:
>
> . . .
>
> Northern Louisiana and
> Southern Arkansas ---------- 1.0¢ per Mcf"

Subsection (d) prescribes quality standards and adjustments to the base rate, with which we need not be concerned here.

The subsections just described are of minor importance in this suit, as they cover only the last year or

two of the period with which we are here concerned. Subpart (B) of the ordering part of Opinion 607 is the legal requirement with which we are here concerned. Recalling again that Opinion 607 was decided in 1971, effective in 1972, its effect on gas already sold at varying prices under suspension orders which left open ultimate prices to be collected was derived from the Commission's order, in Subpart (B), that prices already collected under suspension orders be adjusted by the payment of refunds by the producer, and we quote Subpart (B) as follows:

> "(B) For the purpose of computing refunds in all Section 4(e) proceedings now pending with respect to gas produced in the Other Southwest area, the following base area rates (at 14.65 psia unless otherwise noted) are hereby established, for gas gathered and delivered by the seller at either a central point in the field, the tailgate of a plant, or a point on the buyer's pipeline . . . ."

Immediately following the paragraph just quoted is the detailed description of prices; the first is the one which governs the gas sold by Respondents to Petitioner as follows:

> "(1) Gas sold under contracts dated prior to January 1, 1961:

	Prior to Jan. 1, 1965	From Jan. 1, 1965, through Sept. 30, 1968	From Oct. 1, 1968
. . . .			
Northern Louisiana (at 15.025 psia)	16.7	18.6	20.6
. . . .			
. . . .			

> (4) The applicable area rate shall be adjusted downward, for gas delivered closer to the wellhead than a central point in the field, the tailgate of a plant, or a point on the buyer's pipeline in the same amounts provided in such cases in paragraph (c)(3) of Section 154.109a [quoted above, which reduces the price for wellhead deliveries by 1¢ per Mcf] as added by ordering paragraph (A) hereof, to Part 154 of the Commission's Regulations under the Natural Gas Act and shall be subject to the same quality standards and adjustments as provided by paragraph (d) of said Section 154.109a."

We submit that the Commission in its regulations which we have analyzed and quoted here made it reasonably clear, in establishing prices for thousands of transactions with an almost infinite variation of detail, what the maximum prices should be.

For North Louisiana gas sold in interstate commerce in the period beginning in 1961, the lawful maximum price was retroactively fixed in 1971 for wellhead deliveries (with which we are dealing here) at 1¢ below the prices given in the tabulation last quoted.

It is of no assistance to Respondents to point out, as they have many times done in this litigation, that the Commission has no jurisdiction over the sale of extracted liquids because this case does not involve extracted liquids, but involves, as the court of appeal has specifically held, the sale of gas before the liquids are extracted. As the Commission Examiner said in *El Paso Natural Gas Co.*, 29 F.P.C. 1175, 1207 (1963):

> ". . . What is sold and delivered under these contracts is not liquid hydrocarbons at all, but it is natural gas, all of which is delivered at the

mouth of the well or at the outlet of the separator (if one is installed at the wellhead)."

The United States Supreme Court has approved this approach by the Commission in *Permian Basin Area Rate Cases,* 390 U.S. 747, 819-20 (1968). The fact that the court has interpreted the favored nation clause of the contract involved here as requiring an adjustment in the gas price to give Respondents the equivalent of the payments for extracted liquids made to the United States under the lease, as the court of appeal has held (App. p. 112a), is of no consequence in determining the amount to which Respondents are entitled. Their recovery is limited by the area maximum rate, as described above.

To show the extent to which the district court exceeded these lawful maximum prices, we have taken from the exhibits in the case a year's sales by H. M. Harrell (in 1962), which, on analysis, show the unlawful payment ordered as follows:

Per Mcf price paid by Arkla for wellhead gas (with entrained liquefiable hydrocarbons) delivered (Ex. P-1)	$ .087970
Per Mcf price increase awarded in judgment (Ex. P-322-I)	.090064
TOTAL per Mcf price awarded in judgment	$ .178034

Per Mcf Natural Gas Act ceiling rate for wellhead gas (with entrained liquefiable hydrocarbons) delivered (FPC Opinions 607 and 607-A, Ex. P-340)	$ .157000
Per Mcf amount awarded in excess of ceiling and in violation of Natural Gas Act	$ .021034
Volume produced during 1962 attributable to H. M. Harrell Interests (Ex. P-322-I, col. 2)	1,380,301 Mcf
TOTAL amount awarded for 1962 sales in violation of Natural Gas Act ceilings (volume times excess price awarded)	$29,037.46

To this amount is added Respondents' "adjustment for pertinent factors" (which can not be put on an annual basis), which *further increases* the amount awarded in excess of applicable Natural Gas Act ceilings.

Petitioner demonstrated to the Louisiana courts that a rate increase for all Respondents up to the maximum ceiling rates amounted to approximately $1,600,000. The May 17, 1979 judgment of the Louisiana trial court awarded Respondents a price increase of about $2,200,000, plus an upward adjustment of about $500,000 to account for "pertinent factors" and interest. The total judgment was in excess of $2,700,000.

E. Respondents' counsel did not argue in the Louisiana courts that the amount of the judgment granted as additional price for Respondents' gas under the contract was within the limits of the Commission's Regulations under the *Natural Gas Act*. Rather, their argument was based upon a claim (which counsel did not document and which we have been unable to substantiate) that the Louisiana courts had already decided the question adversely to Petitioner. This argument for Respondents is, in this Court and in the present posture of the case, entirely irrelevant; if in fact the Louisiana courts at any time or in any part of the proceedings in the case made any such ruling, it would constitute a gross and obvious error which surely should be corrected by this Court.

F. We do not repeat in this petition the argument in the petitions in No. 78-986 (and the current petition for rehearing) and in No. 78-1789, and refer the Court to those petitions as to the first three questions presented here.

VII. CONCLUSION

The Louisiana courts have, in the aspect of this case that is presented in this petition, awarded Respondents a rate for the wellhead sale of natural gas which grossly exceeds the rate prescribed for such wellhead gas by the Commission's regulations. The whole case, as set forth in the petition for a writ of certiorari in No. 78-986 (and the petition for rehearing of its denial), in No. 78-1789, and in the present petition, exhibits the complete frustration, by a series of decisions by the Louisiana courts, of the *Natural Gas Act* and its purposes and provisions.

We submit that the entire case as presented by the three petitions should be reviewed by this Court to vindicate the *Natural Gas Act* and its administration by the Federal commission and courts.

Respectfully submittted,

ROBERT ROBERTS, JR.
MARLIN RISINGER, JR.
W. MICHAEL ADAMS
BLANCHARD, WALKER, O'QUIN & ROBERTS
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May, 1980

APPENDIX

APPENDIX TO PETITION FOR CERTIORARI

CONTENTS

Page

APPENDIX A

United States Code, Title 28, Sec. 1257(3) 104a

APPENDIX B

Constitution of the United States, Article VI 104a

APPENDIX C

Opinion, Court of Appeal, Second Circuit, State of Louisiana, January 22, 1980 (reported 379 So.2d 1142) 105a

APPENDIX D

Order, Court of Appeal, Second Circuit, State of Louisiana, February 29, 1980, denying rehearing 118a

APPENDIX E

Order, Supreme Court of Louisiana, May 2, 1980, denying Petitioner's application for writ of certiorari 119a

APPENDIX F

Order, Supreme Court of Louisiana, May 9, 1980, staying execution of judgment 120a

APPENDIX G

Judgment of trial court, May 17, 1979 ..... 122a

APPENDIX H

Federal Power Commission, Code of Federal Regulations, Title 18, Part 154.109a, as added by Federal Power Commission Opinion No. 607, 46 FPC at page 925 (excerpt) 125a

APPENDIX I

Motion in trial court to reopen record 134a

APPENDIX J

Statement of Defendant Setting Forth Summary of Evidence Sought to be Admitted on New Trial .. 137a

APPENDIX A

United States Code, Title 28.

§ 1257(3). STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX B

CONSTITUTION OF THE UNITED STATES

Article VI, Clause II

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX C

[Judgment rendered January 22, 1980]

No. 14,012

COURT OF APPEAL SECOND CIRCUIT
STATE OF LOUISIANA

* * * * * *

FRANK J. HALL, ET AL, *Plaintiffs-Appellees*

VERSUS

ARKANSAS LOUISIANA GAS COMPANY, *Defendant-Appellant*

* * * * * *

Appealed from the First Judicial District Court for the Parish of Caddo, Louisiana

Honorable C. J. Bolin, Jr., Judge

* * * * * *

BLANCHARD, WALKER, O'QUIN & ROBERTS

By: Robert Roberts, Jr., Marlin Risinger, Jr., and W. Michael Adams

Attorneys for Defendant-Appellant, Arkansas Louisiana Gas Company

WIENER, WEISS, MADISON & HOWELL

By: James Fleet Howell

Attorneys for Plaintiffs-Appellees, Frank J. Hall, et al

* * * * * *

Before PRICE, MARVIN and JONES, JJ.

MARVIN, J.

On the original appeal of this case in 1978, we affirmed a judgment activating a *favored nation clause* in a 1952 gas purchase contract which escalated the price of interstate natural gas purchased from the several plaintiffs by defendant Arkla. Plaintiffs there claimed that damages should have been assessed from September 1961, when Arkla began paying a higher price to another seller (the United States), through the year 1975 when suit was brought.

We affirmed the lower court's determination that all plaintiffs except W. E. Hall were entitled to damages only from October 1, 1972 (when plaintiffs were excused by FERC from having to meet FERC requirements to obtain a price increase). W. E. Hall's demands were dismissed on an exception of no cause of action because he had executed an agreement on May 25, 1969, deleting the favored nation clause from his 1952 contract.

The original damage award to plaintiffs totaled more than $900,000. This amount was determined by comparing the price paid to plaintiffs and to the government (for gas and products extracted from the gas) for the entire period (1961-1975). The lower court then proportionately reduced the amount for the entire period to determine the amount for 1972-1975. We remanded because neither party had *pursued* the lower court's suggestion for expert assistance and had not provided the lower court with *means* to accurately reduce or extract the 1961-1975 data to facilitate determination of the damages for the 1972-1975 period.[1]

The Supreme Court granted writs and held in 1979 that the damages for all plaintiffs, except W. E. Hall, should be measured from September 1961 through 1975 and that W. E. Hall should be allowed damages for the period from September 1961 until May 25, 1969 (when he executed the

---

[1] 359 So.2d 255 (La. App. 2d Cir. 1978).

agreement deleting the most favored nations clause from his contract). The Supreme Court "remanded to the district court for assessment of damages in accordance with [its] . . . views . . ." [2]

On remand, the district court apparently considered that the computations and summaries used by the court in originally assessing damages for the 1961-1975 period, and which were contained in the original record and generally approved by us on the original appeal, provided a sufficient evidentiary basis for it to determine the damages to plaintiffs for that period. The district court allowed Arkla to present evidence on remand only as to the damages sustained by plaintiff W. E. Hall for the period 1961 to May 25, 1969.[3]

After remand, the lower court awarded W. E. Hall $160,507.83 and the remaining plaintiffs a total of $2,738,-888.40, which was approximately the amount the trial court reduced on the original trial to compute damages for the 1972-1975 period. Arkla appeals this judgment, contending that the award to the remaining plaintiffs exceeds both the amount paid by Arkla to the United States during the period and the maximum ceiling rates for natural gas allowed by FERC during the period, all in violation of the contract and in violation of the Natural Gas Act (15 U.S.C. § 717 a-w). Plaintiffs seek additional damages, contending that Arkla's appeal is frivolous.

---

[2] 368 So.2d 984 (La. 1979).

[3] As we noted in the original appeal, Arkla was in a superior position to compile and present evidence of the difference in price paid to plaintiffs and to the *favored nation* (the United States) during the period and to compare the pertinent factors upon which the difference in price could be determined. We also noted that neither the plaintiffs nor Arkla pursued the lower court's suggestion that perhaps an expert should be appointed to assist in determining the damages. Again we mention that the pleadings and testimony fill 26 volumes of almost 5,000 pages and that the record includes almost 500 exhibits, some of which are voluminous.

The central issue in this appeal involves the sufficiency of the evidence used in comparing the difference in the price provisions of the two contracts, one contract being the gas purchase contract in 1952 containing the favored nation clause, and the other being the lease contract with the United States of America in 1961, payments under which have been construed as activating the favored nation clause of the other contract.

Under the 1961 lease, Arkla paid the government for the value of liquid hydrocarbons extracted from the natural gas and for the dry (residue) gas remaining after the extraction. Under the 1952 gas purchase contract with plaintiffs Arkla purchased "production from all wells . . . completed as commercially productive of natural gas" subject to the several terms and conditions of the contract. Section 8 of the contract, sub-part D of which contains the most favored nation clause, stipulated the price to be paid for each MCF of gas delivered to Arkla, but recognized that the stipulated price included an additional $.0025 per MCF to compensate the seller for the surrender of rights to receive the value of the LHC extracted by processes *after* delivery to Arkla. Section 8(B) apparently would allow the seller to extract condensate by a separator at the well *before* delivery to Arkla. Section 9 gives Arkla the option of purchasing free condensate that may be produced and recovered from the well by separators and obligates Arkla to pay for such condensate at a "posted" price. This section contains no language relieving Arkla of its obligation to pay the seller for the free condensate even if the condensate is delivered into Arkla's gas gathering lines and then later extracted. Some of the provisions of §§ 8 and 9 are reproduced below:

"8. PRICE

"(A) (1) The price to be paid by Buyer for each one thousand cubic feet of gas delivered hereunder to Buy-

er, on the basis of measurement and calculations hereinafter provided, shall be as follows:

"(a) $0.06997 from the effective date hereof through May 31, 1955;

* * * [graduated to]

"(e) $0.10596 from June 1, 1970, through May 31, 1975;

"(f) $0.11496 during the remainder of the time this agreement shall be in force and effect.

* * *

"(B) The prices . . . paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquifiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products, it being further understood and agreed, however, that nothing herein is intended to deprive Seller of the right to operate a standard type oil field separator at each well subject hereto in order to remove such condensate as may be thereby extracted prior to delivery of production hereunder to Buyer. *The parties take cognizance of the fact that the aforesaid prices hereinabove provided to be paid are $0.0025 per MCF higher than would have been provided had Seller retained the right to participate in the recovery of products by such processing operations subsequent to delivery, and accordingly the aforesaid prices have been calculated and agreed to by the parties with the intention and understanding that payment of the said prices shall constitute payment for all products whatsoever recov-*

erable from the production delivered to Buyer hereunder.

"(C) If in accordance with the provisions of Paragraph (B) of Section 4 of this contract, Buyer dehydrates the gas delivered hereunder, then Seller shall pay to Buyer as a dehydration charge the sum of $0.002 for each one thousand cubic feet of gas dehydrated, which dehydration charge may be deducted by Buyer from remittances due Seller hereunder.

"(D) If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field *at a higher price than is provided to be paid for gas* delivered under this agrement, then in such event the price to be paid *for gas* thereafter delivered hereunder shall be increased by an amount equal to the *difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided* that in determining whether a given price is in fact 'higher' than the price provisions of this contract, *the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures* (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder *shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts.* It is agreed that any

such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

"9. CONDENSATE. *Buyer,* or its assign, *shall have the option* from time to time and upon sixty (60) days' notice, *of purchasing* all of the *free condensate* that may be produced from the subject wells and *which may be recovered* or recoverable *by the use of separators* operated in connection with such wells, and measured by liquid meter, or liquid gas ratio tests as hereinafter set forth, *and shall accept delivery of such condensate into the gas gathering lines or* at Seller's option *from Seller's storage tanks* located on the leases. Buyer, or its said assign, shall deliver to Seller written notice of the exercise of its said option and may discontinue the purchase of condensate by giving Seller sixty (60) days' written notice that it no longer desires to purchase same.

* * *

"*Buyer shall pay* or cause to be paid *to Seller,* for condensate received in accordance with the provisions of this Section, *the price posted by Buyer* or its said assign, as the case may be. Provided, however, that such posted price shall be in line with the prices established by the majority of major oil companies for similar grade condensate in fields in North Louisiana."

Emphasis by the Court.

Arkla insists that the FERC ceiling on gas, whether *wet* (before extraction of LCH [liquid hydrocarbons]) or *dry* (after extraction of LHC) is the sole basis upon which damages should have been assessed and that the price it

pays or paid to the United States for the extracted LHC is not a factor to be considered. Arkla argues that consideration of the price it pays or paid to the United States for LHC ignores and is in the face of the express language of plaintiffs' 1952 gas purchase contract that plaintiffs sold to Arkla only wet gas. The crux of this case is not that plaintiffs sold wet gas, but consideration of the purpose of the favored nation clause, the fact that a portion of the stipulated MCF price for gas under the 1952 contract (¼ cent) was for LHC, and the decisions of state and federal authorities in this controversy that the price Arkla paid the United States for LHC is a "pertinent factor" to be used under section 8 of the 1952 contract in interpreting the favored nation clause and in determining the difference in the price provision of the two contracts. The price provisions can be and have been compared.

Again we determine that for the purpose of giving effect to the favored nation clause—section 8 of the contract, the higher price the United States began to receive from Arkla in 1961 for gas and for LHC is the basis upon which to assess and measure the amounts plaintiffs should have begun to receive monthly from Arkla in 1961 for its gas and LHC. Arkla conditionally concedes as much in its first reply brief:

> "The values paid by Arkla to the United States for extracted plant products can and must be considered under this Court's May 1, 1978, judgment [359 So.2d 255 (La. App. 2d Cir.)] as a pertinent factor to determine the overall price paid to the government on a per Mcf basis. The Court has held that it is a pertinent factor and Arkla cannot attack that holding on this appeal. However, when the Court made that decision, the effect of the application of that pertinent factor on the Plaintiffs' monetary recovery was left to the Trial Court on remand. The Trial Court has considered the issues on remand and has rendered an award in its

> May 17, 1979, judgment, that is *again* grossly in error. This time, the [trial] Court failed to consider the limitations placed upon the award by the Natural Gas Act. The Plaintiffs award should be limited [to a total of $1,609,067.11] . . ."

We cannot agree that the trial court erred.

We reiterate that the purpose of the favored nation or price adjustment clause is to protect the seller under a long-term contract from price discrimination. A contract with favored nations provisions should be interpreted broadly, and not restrictively, to fully effect the provisions. 359 So.2d at p. 262. See also *Eastern Petroleum Company v. Kerr-McGee Corporation,* 447 F.2d 569 (C.A. 7th, 1971). Arkla paid the United States for gas and for LHC. Arkla paid plaintiffs for gas and LHC. Section 8(D) of plaintiffs' contract states that ". . . in determining whether [the price paid the United States for "gas"] is in fact 'higher' than the price provisions of [plaintiffs'] contract, the inquiry shall not be limited to the actual prices stipulated [for "gas"], but *due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts such as*

> point of delivery,
>
> basis of measurement,
>
> taxes,
>
> dehydration, and
>
> delivery pressure . . .

and the price to be thereafter payable [to plaintiffs] *shall be adjusted accordingly* insofar as *may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts . . . subject to any rules and regulations of . . . any . . . regulatory body having jurisdiction."*

We have again reviewed in the original record, summaries and the testimony of the plaintiff-expert at whose direction they were prepared. We do not depart from our 1978 observation.[4] We remanded in 1978, not because we thought that this evidence was deficient or suspect or that plaintiffs' recovery should be limited by the amount that Arkla paid the United States for its *dry* gas after LHC extraction. In the 1952 contract, *gas* includes LHC and the price provisions of the contract provide a price for both.

The lower court originally used the data summaries and testimony relating to the comparison of pertinent factors for the entire period (1961-1975) to determine damages for the 1972-1975 limited period that the lower court and we thought damages were owed.[5] The lower court propor-

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[4] In our 1978 opinion we observed that the plaintiff-expert

> ". . . gathered all of the pertinent data necessary to calculate damages . . . for the entire period . . . 1961 through . . . 1975. Based on the data obtained . . . schedules [were prepared to reflect a comparison in the price . . . paid . . . plaintiffs with that . . . paid to the United States . . . during this fourteen-year-period . . . [and] which related to the differential in the price of gas to the volumes sold by plaintiffs to defendant for the period. Built into these summaries are the adjusting factors . . . considered necessary to render the prices comparable. These summaries were . . . extended to calculate . . . interest on the sums claimed during the period."

359 So.2d at 264.

[5] We note that the FPC-FERC agreed with the original determination by the lower court and by this court that damages were due for the limited period 1972-1975:

• • •

"Prior to 1972 the Hall group did not hold small producer certificates. In the 'Order Denying Application for Rehearing' issued June 5, 1976, the FPC stated on p. 2, n. 1.:

> 'Prior to the filing of their small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on

tionately reduced the damages for the 1961-1975 period ($2,800,000) by 68 percent to determine the damages for the 1972-1975 period ($900,000). We remanded because neither party had *pursued* the lower court's suggestion for expert assistance and had not provided the lower court with *means* to accurately reduce or extract the 1961-1975 data to facilitate determination of the damages for the 1972-1975 period. We were then, as we are now, satisfied that plaintiffs are entitled to have the favored nation clause

---

file with this Commission and in effect. See *Samedan Oil Corp., et al.*, 37 FPC 207, and cases cited therein.

"The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana court therefore deemed that the Hall group had fullfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

"It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 349 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of certiorari has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision. *Arkla* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978."

Arkansas Louisiana Gas Company v. Frank F. Hall, et al, Docket No. RI-76-28, Order Declining Jurisdiction After Reconsideration of the Issue on Remand, issued May 18, 1979, footnote 18. See also footnote 20.

The U.S. Supreme Court denied certiorari on October 1, 1979.

interpreted to allow them an escalation of the amounts Arkla paid plaintiffs for gas (whether wet or dry) and for any extracted LHC (originally ¼ cent per MCF) determined by the price Arkla paid the United States for its gas (albeit dry) and for the extracted LHC. The Supreme Court of Louisiana agreed and FERC so understood.

> "The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate."
>
> Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5.

Section 8 of the 1952 contract, pertinent parts of which have been quoted, effectively states that the price Arkla pays for each MCF of *gas* includes ¼ cent for [LHC and] other products which may be recoverable from the gas. On the *basic contract question* (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas *and* for LHC products severed from its gas. In effect Arkla paid the government and the plaintiffs for *wet* gas. The eventual price was determined by the MCF after extraction of LHC and by the price for the LHC. The price plaintiffs received for its gas after extraction of LHC and for the LHC was less than what the government received.

The 1952 contract provides that, once the favored nation clause is activated, the increase plaintiffs shall receive shall be ". . . an amount equal to the difference between *the price provisions* [of the 1952 contract] and the . . . higher *price provisions* of [the 1961 contract with the

United States] . . ." The price provisions of plaintiffs' contract and of the United States' contract have been compared and the difference has been determined. Plaintiffs should receive for their gas and for the LHC in the gas the higher amount the United States was receiving for its gas *and* the LHC in the gas. *Gas* in the 1952 contract includes the LHC. Each contract contains price provisions for gas and for LHC. When the price provisions of the two contracts, comparing the pertinent factors, are considered, plaintiffs are entitled to the damages assessed.

Plaintiffs are not entitled to damages for frivolous appeal. At Arkla's cost, judgment is AFFIRMED.

APPENDIX D

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

Office of the Clerk, Shreveport, Louisiana. February 29, 1980

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Defendant-Appellant have this day been refused, en banc.

FRANK J. HALL, ET AL

versus

ARKANSAS LOUISIANA GAS CO.

Docket No. 14,012

Comments (if any were given by the Court):

Sincerely,

Harold L. Booth
Clerk of Court

cc:
Mr. James Fleet Howell
Wiener, Weiss, Madison & Howell
411 Commercial Bank Building
Shreveport, La. 71101

Blanchard, Walker, O'Quin & Roberts
Attorneys at Law
P. O. Drawer 1126
Shreveport, La. 71163

APPENDIX E

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

No. 67,225

FRANK J. HALL, ET AL

VS

ARKANSAS LOUISIANA GAS COMPANY

In Re: Arkansas Louisiana Gas Company, applying for Certiorari, or Writ of Review, to the Court of Appeal, Second Circuit, No. 14,012, Parish of Caddo.

May 2, 1980

Denied.

JCW

JAD

PFC

WFM

FAB

A TRUE COPY

Clerk's Office
Supreme Court of Louisiana
New Orleans

May 2, 1980

/s/ FRANS J. LABRANCHE, JR.
Clerk of Court

APPENDIX F

SUPREME COURT
STATE OF LOUISIANA

DOCKET No. 67,225

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS

Plaintiffs-Respondents

VS.

ARKANSAS LOUISIANA GAS COMPANY

Defendant-Applicant

Order

Upon consideration of the application of Arkansas Louisiana Gas Company, Petitioner, for stay of execution and enforcement of judgment, it is

ORDERED that execution of or any proceeding to enforce the judgment of this Court entered herein on May 2, 1980, and also the judgment herein of the Court of Appeal, Second Circuit, State of Louisiana, entered on the 22nd day of January, 1980, which affirmed the judgment of the First Judicial District Court entered May 17, 1979, be and the same is hereby stayed pending Petitioner's application to the Supreme Court of the United States for certiorari in this cause and the Court's consideration thereof. In the event the petition for certiorari is dismissed or denied, the stay shall be terminated automatically. In the event the petition for certiorari is granted, the stay shall con-

tinue pending issuance of the mandate of the Supreme Court of the United States.

New Orleans, Louisiana, this 9th day of May, 1980.

SUPREME COURT OF LOUISIANA

A TRUE COPY

/s/ FRANS J. LABRANCHE, JR.
Frans J. Labranche, Jr.
Clerk of Court

/s/ JOHN A. DIXON
Justice
Supreme Court of Louisiana

APPENDIX G

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL

VERSUS

ARKANSAS LOUISIANA GAS COMPANY

Judgment

The Louisiana Supreme Court in the case of "*Frank J. Hall, et al v. Arkansas Louisiana Gas Company,* Docket Number 62,560, Supreme Court of Louisiana" on March 5, 1979 rendered a judgment on the merits of this contractual dispute. The judgment of the Louisiana Supreme Court dated March 5, 1979 became effective on April 9, 1979 when the Louisiana Supreme Court denied Arkansas Louisiana Gas Company's "Application For a Rehearing".

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to the Judgment of the Louisiana Supreme Court dated March 5, 1979 and the evidence contained in the record of this case there be judgment herein in favor of the following Plaintiffs against the Defendant, ARKANSAS LOUISIANA GAS COMPANY, awarding to said Plaintiffs compensatory damages in the sums as hereinafter set forth for the actual losses caused by Arkansas Louisiana Gas Company's breach of contract from September, 1961 through December, 1975, to wit:

FRANK J. HALL	—$423,167.91
VIRGIL J. HALL, widow	— 115,409.27
CARLYLE W. URBAN, Trustee under Will of H. M. HARRELL	— 634,233.61

JOHN K. HARRELL, SR.	— 79,278.48
JAMES E. HARRELL	— 79,278.48
ELVA L. WEISS, widow	— 177,666.20
NATIONAL AMERICAN BANK, Executor under Will of SEYMOUR WEISS	— 177,666.20
T. F. PHILYAW	— 3,712.38
W. O. COCHRAN	— 14,513.62
D. B. McCONNELL	— 132,193.25
S. G. MYERS	— 130,215.91
JAMES A. NOE, JR. and C. T. MUNHOLLAND, Testamentary Executors under Wills of MR. & MRS. JAMES A. NOE	—$478,528.37
ASA BENTON ALLEN	— 67,282.56
ELAINE ALLEN	— 65,234.33

IT IS ORDERED, ADJUDGED AND DECREED that the above and foregoing Plaintiffs are awarded legal interest on $1,677,-168.06 of the above and foregoing compensatory damages from July 1, 1976 until paid and that the remaining damages, i.e. $901,212.51, shall not bear or accrue any legal interest whatsoever.

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to the Judgment of the Louisiana Supreme Court dated March 5, 1979 and the evidence contained in the record in this case there shall be judgment herein in favor of Mr. W. E. Hall, Jr., Plaintiff, against the Defendant, Arkansas Louisiana Gas Company, awarding to said Plaintiff compensatory damages in the sum as herein set forth for the actual losses caused by Arkansas Louisiana Gas Company's breach of contract from September, 1961 through May 24, 1969, to wit:

W. E. HALL, JR.	—$160,507.83

IT IS ORDERED, ADJUDGED AND DECREED that W. E. HALL, JR. is awarded legal interest on $97,208.42 of said compensatory damages from May 25, 1969 until paid and that $63,299.41 of the damages as awarded to Mr. W. E. Hall, Jr. shall not bear or accrue any legal interest whatsoever.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded a recovery herein for all costs of this proceeding.

JUDGMENT READ, RENDERED AND SIGNED on May 17, 1979 at Shreveport, Louisiana.

ENDORSED FILED

W. C. YOUNG, Deputy Clerk

May 17, 1979

A TRUE COPY—Attest

/s/ W. C. YOUNG
Deputy Clerk

/s/ C. J. BOLIN, JR.
C. J. Bolin, Jr.
District Judge

APPENDIX H

Opinion No. 607

Area Rate Proceeding, et al. (Other Southwest Area),
Docket No. AR67-1, et al.

Upon consideration of the entire record in this proceeding, which includes public notice, public hearing with opportunity for the submission of oral and documentary evidence, for cross-examination, and for the submission of rebuttal evidence, initial decision by an Examiner, exceptions thereto, and oral argument before the Commission,

The Commission further finds:

(1) The Other Southwest Area comprises: (a) The State of Mississippi and the Federal domain offshore thereof; (b) Northwest Alabama, consisting of Marion, Fayette, Lamar and Pickens Counties; (c) Northern Louisiana, consisting of that portion of Louisiana lying north of the 31 degree parallel through Concordia, Pointe Coupee, Avoyelles, Rapides, and Vernon Parishes; (d) Texas Railroad Commission Districts Nos. 5, 6, and 9; (e) Other Oklahoma, consisting of Adair, Atoka, Bryan, Carter, Cherokee, Choctaw, Cleveland, Coal, Comanche, Cotton, Craig, Creek, Delaware, Garvin, Greer, Harmon, Haskell, Hughes, Jackson, Jefferson, Johnston, Kay, Kiowa, Latimer, Le Flore, Lincoln, Logan, Love, McClain, McCurtain, McIntosh, Marshall, Mayes, Murray, Muskogee, Noble, Nowata, Okfuskee, Oklahoma, Okmulgee, Osage, Ottawa, Pawnee, Payne, Pittsburgh, Pontotoc, Stephens (except Carter-Knox Area), Tillman, Tulsa, Wagoner, Washington, Pottawatomie, Pushmataha, Rogers, Seminole, and Sequoyah Counties; (f) Northern Arkansas, consisting of Sevier, Howard, Pike, Clark, Dallas, Cleveland, Drew, and Desha Counties, and all other Arkansas counties north of this group; (g) Southern Arkansas, consisting of Little River, Hempstead, Miller, Lafayette, Nevada, Columbia, Ouachita, Union, Calhoun, Bradley, Ashley, and Chicot Counties, Arkansas.

(2) Each of the respondents [24] listed in Appendix A to this Opinion and order is, and at the time of all past sales with which we are here concerned was, a "natural-gas company" within the meaning of the Natural Gas Act and is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption subject to the jurisdiction of this Commission.

(3) Past, present, and proposed sales of natural gas to which the order herein applies are subject to the jurisdiction of this Commission.

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[24] Where the term "respondents" is used in the finding and ordering paragraphs hereinafter set forth, it is to be regarded as referring to all named respondents in the Commission orders issued in this case, and to all parties on whose behalf such named respondents have filed FPC gas rate schedules for sales of gas produced in the Other Southwest.

(4) Rates for all sales of natural gas, subject to the jurisdiction of the Commission by the producers in the Other Southwest area that are above the applicable area rates prescribed herein, have not been shown to be just and reasonable or otherwise lawful under the provisions of the Natural Gas Act and should be disallowed, and refunds should be required as hereafter provided.

(5) The just and reasonable rates for past, present, and prospective sales of natural gas to which this order applies are the applicable area rates set forth in ordering paragraphs (A) and (B) below.

(6) Rates in excess of the applicable just and reasonable rates determined herein are in that respect unjust and unreasonable.

(7) It is necessary and appropriate to carry out the provisions of the Natural Gas Act that the Commission adopt the orders and regulations herein prescribed.

(8) Except as herein granted the exceptions to the initial decision and proposed order should be denied.

Acting pursuant to Sections 4, 5, and 16 of the Natural Gas Act (52 Stat. 822, as amended, 823, 830; 15 U.S.C. 717c, 717d, 717o) and Sections 553, 556, and 557 of Title 5 of the United States Code (The Administrative Procedure Act, 60 Stat. 238, 239. 241, 242, as codified September 6, 1966, by 80 Stat. 383, 384, 386, 387),

The Commission orders:

(A) Part 154 of the Commission's Regulations under the Natural Gas Act, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new Section 154.109a reading as follows:

Part 154—Rate Schedules and Tariffs.

* * * * * * *

§ 154.109a Area Rates—Other Southwest area.

(a) From and after January 1, 1972, and prior to July 1, 1976, no rate or charge made, demanded or received under a rate schedule filed pursuant to this Part for gas produced in the Other Southwest area shall exceed the applicable area rate prescribed by this section except in compliance with a specific order of the Commission.

(b) Applicable area rate means the base area rate established in paragraph (e) adjusted to the extent required by paragraph (d).

(c) *The Base Area Rates.* The following base area rates per Mcf (at 14.65 psia unless otherwise noted) are hereby established for the period from January 1, 1972, to July 1, 1976, subject to the adjustments provided in paragraph (d), for gas gathered and delivered by the seller at either a central point in the field, the tailgate of a plant or

point on the buyer's pipeline, or an offshore platform to the buyer's line, by the following:

(1) Gas sold under contracts dated prior to October 1, 1968:

	From Jan. 1, 1972, through Sep. 30, 1973	Beginning Oct. 1, 1973
Other Oklahoma	19.4	20.4
Texas Railroad District No. 9	19.7	20.7
Northern Arkansas	18.8	19.8
Texas Railroad District No. 6	19.1	20.1
Narthern Louisiana (at 15.025 psia)	20.6	21.6
Southern Arkansas	18.25	19.25
Mississippi and Alabama (at 15.025 psia)	20.0	21.0

(2) Gas sold under contracts dated on or after October 1, 1968:

	From Jan. 1, 1972 through Sept. 30, 1974	Beginning Oct. 1, 1974
Other Oklahoma	23.75	24.75
Texas Railroad District No. 9	24.0	25.0
Northern Arkansas	23.0	24.0
Texas Railroad Districts Nos. 5 and 6	23.5	24.5
Norther Louis ana (at 15.025 psia)	25.0	26.0
Southern Arkansas	22.5	23.5
Mississippi and Alabama (at 15.025 psia)	25.0	26.0

	From Jan. 1, 1972, through Sept. 30, 1973	Beginning Oct. 1, 1973
Federal Domain Offshore of Mississippi	26.0	27.0

(3) The applicable area rate shall be adjusted downward, for gas delivered closer to the wellhead than a central point in the field, the tailgate of a plant, a point on the buyer's pipeline or an offshore platform on the buyer's line by the following:

Other Oklahoma, Texas Railroad District No. 9, and Northern Arkansas	1.5 cents per Mcf
Texas Railroad Districts Nos. 5 and 6, Northern Louisiana and Southern Arkansas	1.0 cent per Mcf
Mississippi and Alabama	1.25 cents per Mcf

(d) *Quality Standards and Adjustments to the Base Area Rates.* The base area rates established in paragraph (c) are subject to adjustment as follows:

(1) *Btu Adjustment*—For gas with more than the maximum standard of Btu's per cubic foot, at 60°F and 14.73 psia, upward adjustments shall be made on a proportional basis from a base equal to the maximum standard. For gas with less than the minimum standard of Btu's per cubic foot, at 60°F and 14.73 psia, downward adjustments

shall be made on a proportional basis from a base equal to the minimum standard. Measurement of Btu shall be on a wet basis. The applicable maximum and minimum standards are:

	Maximum	Minimum
Other Oklahoma, Texas Railroad District No. 9, and Northern Arkansas	1060	1000
Texas Railroad Districts Nos. 5 and 6, Northern Louisiana and Southern Arkansas	1030	1000
Mississippi and Alabama	990	950
Federal Domain Offshore of Mississippi	1050	1000

(2) The following additional quality standards shall apply:

(i) *Water Content*—The gas shall not contain in the aggregate more than seven pounds of water, either in the form of liquid or vapor, per million cubic feet of gas at 60°F and 14.73 psia (.007 lbs. per Mcf).

(ii) *Hydrogen Sulphide*—The gas shall not contain more than one grain of hydrogen sulphide per one hundred cubic feet of gas at 60°F and 14.73 psia (10 gr. per Mcf).

(iii) *Total Sulphur*—The gas shall not contain more than 20 grains of total sulphur per one hundred cubic feet of gas at 60°F and 14.73 psia (200 gr. per Mcf).

(iv) *Carbon Dioxide*—The gas shall not contain more than 3 percent by volume of carbon dioxide.

(v) *Other Impurities*—The gas shall contain no oxygen, dust, dirt, gum, or other impurity in sufficient amounts to require the buyer to incur processing costs to eliminate such impurities in order for the gas to meet either customary commercial standards or the customary requirements of any of the interstate pipelines in the area.

(vi) *Delivery Pressure*—The gas shall be delivered at a pressure sufficient to enter the buyer's pipeline except that a minimum of 500 psig must be available at the point of delivery.

(3) When a purchaser buys gas which deviates from the quality standards established in subparagraph (2) above, the base area rate shall be adjusted for any deviations from such standards as follows:

(i) The applicable area rate shall be adjusted downward by the net cost, actually incurred prior to ultimate consumption, of processing the gas to bring it up to standard.

(aa) If the processing is performed by the purchaser, a reasonable return upon the net investment should be included as part of the processing cost incurred in bringing the gas up to pipeline quality.

(bb) If such processing reduces the volume of the gas, the purchaser shall pay for only the volume remaining after processing.

(ii) In the case of delivery by seller of gas containing carbon dioxide in excess of the standards herein permitted, notwithstanding

anything to the contrary in Paragraph (2)(iv), the producers shall have the alternative of receiving payment for the total volume of gas delivered, including the carbon dioxide, providing that the Btu content of the gas is measured before the removal of the carbon dioxide for the purposes of the Btu adjustments specified in this order, or receiving payment for the volumes exclusive of the carbon dioxide with the Btu measured by the volumes of gas only.

(e) Prior to July 1, 1976, any seller seeking to charge a rate in excess of the applicable area rate or requesting a change in the applicable area rate must file a petition for waiver or amendment of this section pursuant to Section 1.7(b) of the Commission's Rules of Practice and Procedure (18 CFR 1.7(b)) fully justifying the relief sought in the light of this Opinion and order. Prior to July 1, 1976, the seller may not file any rate increase in excess of the applicable area rate herein prescribed unless and until the Commission grants the petition.

(B) For the purpose of computing refunds in all Section 4(e) proceedings now pending with respect to gas produced in the Other Southwest area, the following base area rates (at 14.65 psia unless otherwise noted) are hereby established, for gas gathered and delivered by the seller at either a central point in the field, the tailgate of a plant, or a point on the buyer's pipeline:

(1) Gas sold under contracts dated prior to January 1, 1961:

	Prior to Jan. 1, 1965	From Jan. 1, 1965, through Sept. 30, 1968	From Oct. 1, 1968
Other Oklahoma	17.5	18.4	19.4
Texas Railroad District No. 9	17.8	18.7	19.7
Northern Arkansas	17.0	17.9	18.8
Texas Railroad District No. 6	15.0	17.0	19.1
Northern Louisiana (at 15.025 psia)	16.7	18.6	20.6
Southern Arkansas	14.4	16.25	18.25
Mississippi and Alabama (at 15.025 psia)	19.0	19.5	20.0

(2) Gas sold under contracts dated from January 1, 1961 through September 30, 1968:

	Prior to Jan. 1, 1965	From Jan. 1, 1965, through Sept. 30, 1968	From Oct. 1, 1968, until Jan. 1, 1972
Other Oklahoma	18.4	18.9	19.4
Texas Railroad District No. 9	18.7	19.2	19.7
Northern Arkansas	17.8	18.3	18.8
Texas Railroad District No. 6	18.1	18.6	19.1
Northern Louisiana (at 15.025 psia)	19.6	20.1	20.6
Southern Arkansas	17.25	17.75	18.25
Mississippi and Alabama (at 15.025 psia)	19.0	19.50	20.0

(3) Gas sold under contracts dated on or after October 1, 1968:

Other Oklahoma	23.75
Texas Railroad District No. 9	24.0
Northern Arkansas	23.0
Texas Railroad Districts Nos. 5 and 6	23.5
Northern Louisiana (at 15.025 psia)	25.0
Southern Arkansas	22.5
Mississippi and Alabama (at 15.025 psia)	25.0

(4) The applicable area rate shall be adjusted downward, for gas delivered closer to the wellhead than a central point in the field, the tailgate of a plant, or a point on the buyer's pipeline in the same amounts provided in such cases in paragraph (c)(3) of Section 154.109a as added by ordering paragraph (A) hereof, to Part 154 of the Commission's Regulations under the Natural Gas Act, and shall be subject to the same quality standards and adjustments as provided by paragraph (d) of said Section 154.109a.

(C) The applicable area rates as defined in ordering paragraph (A) above, shall be effective from and after January 1, 1972 and any amounts collected in excess thereof on or after that date shall be subject to refund plus interest at 7 percent. In addition, with respect to the rates involved in Section 4(e) proceedings set out in Appendix A, the applicable area rate as defined in paragraph (B) above, shall be effective from the date such Section 4(e) rates were collected subject to refund and all amounts collected under those Section 4(e) rates prior to the effective date of this Opinion in excess of the applicable area rate shall be subject to refund, plus interest at the rate specified in the respective Section 4(e) proceeding, in accordance with the provisions of ordering paragraphs (E) and (F) herein; provided, however, that with respect to such 4(e) dockets no refunds are required below the rate allowed in a final, unconditional permanent certificate previously granted for such sale.

(D) By February 1, 1972 each respondent shall file a supplement to each applicable rate schedule, effective as of January 1, 1972, reflecting any reductions required to bring any or all of its rates into conformity with the applicable base area rates established by ordering paragraph (A) herein. The timely filing of a completed statement in conformity with Appendix D hereto shall constitute compliance with this paragraph (D).

(E) Each person having on file with this Commission a rate schedule with regard to gas produced or sold within the Other Southwest area, or hereafter filing such a rate schedule (including a contract or amendment adding acreage or new reserves) shall, with regard to such rate schedule or amendment, file by February 1, 1972, or within 90 days from the date of first delivery under the rate schedule or amend-

ment, whichever is later, a statement in conformity with Appendix D hereto. All statements herein required shall be signed by both the seller and the purchaser. If the seller and the purchaser are unable to agree upon any or all of the particulars entering into the computation of the applicable area rate, the seller shall file the statements herein required which shall indicate the absence of agreement and supply the information required to compute the applicable area rate as well as the contentions of the parties with respect to the quality and amount of the adjustment for any item in dispute. The purchaser may file a separate statement setting forth its views within the period herein provided.

(2) The statement filed hereunder which reflects full agreement between the seller and purchaser shall be deemed accepted by the Commission unless the Commission, within 120 days after such filing, shall otherwise order. In the event of disagreement between the seller and purchaser or, where the Commission otherwise determines that the statement filed is inconsistent with the provisions of ordering paragraph (A) herein, the Commission will after appropriate proceedings, prescribe the applicable area rate to be applied.

(3) Any respondent will be exempt from filing the statement required by subparagraph (1) hereof for any sales which are "small producer sales" as defined in the Commission's Regulations under the Natural Gas Act if a producer seeks to qualify thereunder. If the Commission subsequently finds that such a producer does not qualify as a small producer such applicant shall be required to file the statement required by subparagraph (1) hereof within 90 days after any such Commission finding.

(F) *Refund Reports.* By February 1, 1972, refund reports shall be filed with this Commission in triplicate, and one copy served on the buyer, by each respondent involved in one or more of the Section 4(e) proceedings set out in Appendix A and as to which refunds are required under the terms of this decision. Within 20 days from the filing of the refund report the buyer shall file its written concurrence or disagreement with such report. Each producer within 30 days of filing a refund report shall notify each working interest owner under each rate schedule of any refunds, including interest, applicable to its gross interest. The report shall set forth the following information (if more than one rate schedule is involved the respondent shall supply the information for each schedule separately):

(i) The rates collected during the period subject to refund, and the periods during which each rate was collected.

(ii) The volume of gas sold at each such rate.

(iii) The difference between the total amount collected during the period subject to refund and the amount that would have been col-

lected at the applicable area rate as defined herein subject to the proviso of ordering paragraph (C).

(iv) The computation of the applicable area rate and the basis for any difference between it and the base area rate.

(v) The interest, at rates as specified in each Section 4(e) proceeding, on the above refundable excess revenues, subject to the limitation by Section 154.102(f) of the Commission's Regulations under the Natural Gas Act. The interest shall be calculated to the date of the refund report.

(G) *Treatment of Refunds.* Each respondent shall retain the amounts shown in the report required under ordering paragraph (F) subject to further order of the Commission directing the disposition of those amounts. If a respondent elects to commingle these retained refunds with its general assets and use them for its corporate purposes, it is authorized so to do after notice to the Commission; and it shall pay interest thereon at the prime rate, in effect as of 12:00 noon on the date of issuance of this Opinion and order for loans made by the Chase Manhattan Bank, on all funds thus available from the effective date of this order to the date on which they are paid over to the person ultimately determined to be entitled thereto in a final order of the Commission. If a respondent elects to deposit the retained funds in a special escrow account, the respondent shall make such deposit and shall comply with the escrow agreement requirements of Section 250.12 of the Regulations under the Natural Gas Act (18 CFR 250.12). Unless notified to the contrary by the Secretary within 30 days from the date of filing thereof, the escrow agreement shall be deemed to be satisfactory and to have been accepted for filing.

(H) The provisions of Section 154.63 of the Commission's Regulations under the Natural Gas Act are waived to permit pipeline companies to file rate increase applications to track producer rate increases filed pursuant to the provisions of this order; such tracking applications may be filed by pipeline purchasers or by pipelines purchasing from such pipeline purchasers which are not authorized to track rate changes of their suppliers with regard to gas from Other Southwest, provided that pipelines filing such an adjustment submit working papers with the filing showing the computation thereof, and, provided further, that the rate or rates as revised by such rate increase applications shall be collected subject to reduction and refund from the effective date of such increased rate or rates.

(I) Section 2.52, Part 2, General Policy and Interpretations, of the Commission's General Rules is waived so as to permit the filing of a rate increase application to track producer rate increases filed pursuant to the provisions of this order by a pipeline purchaser or by a pipeline purchasing from such a pipeline purchaser where the pipe-

lines has a proposed increased rate or rates under suspension at the time of such tracking application.

(J) The procedures for establishing and revising the amount of reserves in new dedications, and the reports required, will be established by later order of the Commission.

(K) These proceedings shall remain open for such further action as may be necessary with respect to individual respondents and such other action as may be necessary in the premises.

(L) The Secretary of the Commission is authorized to accept filings of rate changes and quality statements made in accordance with this Opinion and order.

(M) Except as herein granted the exceptions to the initial decision and proposed order are hereby denied.

(N) The Secretary shall cause prompt publication of the findings and ordering paragraphs, together with notice of the availability of this entire Opinion, to be made in the Federal Register.

(O) This order does not relieve any of the Applicants herein of any responsibility imposed by, and is expressly subject to, the Commission's Statement of Policy Implementing the Economic Stabilization Act of 1970 (P.L. 91–379, 84 Stat. 799, as amended by P.L. 92–15, 85 Stat. 38), including such amendments as the Commission may require, and Executive Order No. 11615.

APPENDIX A

PART I

RESPONDENT INDEPENDENT PRODUCERS [1]

Adams, N. L., Sr.
Alexander, C. W.
Alexander, E. B., Jr.
Allied Materials Corp.
Alston, Francis H.
Amax Petroleum Corp.
A'Mell Oil Properties
Amerada Hess Corp.
Americana Oil & Gas Properties of Texas, Inc.
American Exploration Development Corp.
American Petrofina, Inc.
American Petrofina Co. of Texas
American Realty and Petroleum Corp.
American Trading and Production Corp.
Anadarko Production Co.
An-Son Corp.
Anderson, Jacqueline
Anderson Petroleum
Andrewski, H. C. & Gertrude B.
Anisman, M., Trustee
Anisman, Morris
Apache Corp.
Apco Oil Corp.
Argo, M. M.
Arkla Exporation Co.
Arrington, J. H.
Ascher, M.

[1] All persons named herein and all parties on whose behalf such persons have filed FPC gas rate schedules for sales of gas produced in the Other Southwest Area are respondents in this proceeding, including their successors and assigns. See page 938, *infra*, for listing of company name changes.

APPENDIX I

FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF CADDO,
STATE OF LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL.

VS.

ARKANSAS LOUISIANA GAS COMPANY

Motion to Reopen Record

Filed May 15, 1979

NOW INTO COURT, through undersigned counsel, comes Defendant, ARKANSAS LOUISIANA GAS COMPANY ("Arkla"), and moves the Court to reopen the record in the above-entitled and numbered cause on remand from the Louisiana Supreme Court in order to receive additional evidence, as more particularly set forth below:

1.

In a judgment rendered May 1, 1978, this Court's original judgment rendered December 5, 1977, was set aside and the case was remanded for a new trial in accordance with the views expressed in the opinion of the Court of Appeal, *Hall v. Arkansas Louisiana Gas Company,* 359 S.2d 255 (La. App. 2nd Cir. 1978).

2.

By judgment rendered March 5, 1979, the Louisiana Supreme Court amended the judgment of the Court of Appeal in order to expand the recovery of the Plaintiffs for the period September, 1961, through December 31, 1975, with Plaintiff W. E. Hall's recovery limited to the period September, 1961, through May 24, 1969. *Hall v. Arkansas Louisiana Gas Company,* 368 So.2d 984 (La. 1979).

3.

The order issued by the Court of Appeal on May 1, 1978, remanding the case for a new trial was not altered by the Louisiana Supreme Court, the Court of Appeal judgment being only amended for the purpose of expanding the period of recovery for the Plaintiffs. Accordingly, the order of the Court of Appeal remanding the case for a new trial still stands.

4.

On remand from the Louisiana Supreme Court, and in accordance with the Court of Appeal opinion, Arkla requests that the Court reopen the record in order to allow submission by Defendant of testimony regarding the following:

(1) Evidence relating to the per Mcf price increase claimed by the Plaintiffs (and to be awarded in accordance with the judgment submitted by the Plaintiffs) and the extent to which the total price claimed by Plaintiffs exceeds the maximum lawful area or ceiling rates established by the Federal Power Commission (now the Federal Energy Regulatory Commission) under the Natural Gas Act, a summary of such evidence being contained in Exhibits A through K attached hereto and made a part hereof;

(2) Evidence relating to the proper allocation of the claim of Plaintiff W. E. Hall, Jr., said evidence being summarized on Exhibit A attached to and made a part hereof.

5.

Should the Court deny Defendant the right to submit additional testimony, then the Court should allow the Defendant to make a complete record of such testimony as a proffer of proof; and, should the Court deny Defendant the right to make the proffer of proof on the record, then the Court should allow the Defendant to make a state-

ment setting forth the nature of the evidence, all in accordance with Louisiana Code of Civil Procedure, Article 1636.

WHEREFORE, DEFENDANT, ARKANSAS LOUISIANA GAS COMPANY, PRAYS that this Court enter an order reopening the record of this cause for the submission into evidence the testimony described in Paragraph 4 hereinabove.

IN THE ALTERNATIVE, and only in the event the Court denies Defendant the right to submit additional testimony, then the Court should allow Defendant to make a complete record of its submission as an offer of proof in accordance with Article 1636 of the Louisiana Code of Civil Procedure.

IN THE FURTHER ALTERNATIVE, and only in the event the Court denies Defendant's Motion to Reopen Record, then the Court should permit Defendant to make a statement in the form of Exhibits A through K attached hereto and made a part hereof setting forth the nature of the evidence offered and such statement should be filed in the record of the above-entitled and numbered cause.

DEFENDANT FURTHER PRAYS for all orders and decrees necessary in the premises and full, general and equitable relief.

BLANCHARD, WALKER, O'QUIN & ROBERTS

Robert Roberts, Jr.
Marlin Risinger, Jr.

By /s/ W. MICHAEL ADAMS
W. Michael Adams

15th Floor, First National Bank Tower
Post Office Drawer 1126
Shreveport, Louisiana 71163

ATTORNEYS FOR DEFENDANT, ARKANSAS LOUISIANA GAS COMPANY

APPENDIX J

Exhibit A

Statement of Defendant Setting Forth Summary of Evidence Sought to be Admitted on New Trial

If Defendant were allowed to present evidence on a new trial, Mr. W. W. McLeod, Supervisor of Gas Accounting for Arkansas Louisiana Gas Company, would testify regarding the following matters and would offer into evidence accompanying his testimony the documents identified:

1.

Mr. McLeod has testified on behalf of Defendant in this case during the trial hereof in 1976 and 1977 and he is familiar with the exhibits offered by the Plaintiffs in this case with respect to the calculation of Defendant's monetary liability in the case.

2.

He is particularly familiar in this regard with Plaintiffs' exhibits P-318, P-318-A, P-319, P-320, P-321-A through P-321-Q, P-322-A through P-322-H, P-322-I through P-322-M, P-323, and P-331.

3.

Attached to this statement are Exhibits B through K which set forth certain information with respect to each Plaintiff or each group of Plaintiffs, said information having been derived from Plaintiffs' exhibits, as more particularly described below:

(A) The first column of each exhibit represents the time period of Plaintiff's recovery.

(B) The second column of each exhibit represents the volume produced in thousand cubic feet (Mcf) attributable to each Plaintiff's interest. These figures

are derived from Column No. 2 on Plaintiffs' Exhibit P-322-I.

(C) Column No. 3 represents the total amount of the price increase claimed by Plaintiffs for each time period specified. This information is derived from Column No. 7 on Plaintiffs' Exhibit P-322-I.

(D) In order to obtain in Column No. 4 the per Mcf price increase claimed by the Plaintiffs, the total price increase in Column No. 3 is divided by the volume produced in Column No. 2.

(E) Column No. 5 represents the per Mcf price paid by Defendant to Plaintiffs and is the base price set forth in the contract, Plaintiffs' Exhibit P-1, for the applicable time period, and is also set forth on Plaintiffs' Exhibit P-319-A.

(F) The total per Mcf price claimed by the Plaintiffs in Column No. 6 is obtained by adding Column Nos. 4 and 5.

(G) At the bottom of each of the Exhibits B through K attached hereto, the total price increase for all of the years for each Plaintiff is shown. The Plaintiffs' "First, Second and Third Adjustments" (Exhibit P-322-M) and the Plaintiffs' "Credit for Pertinent Factors" (Exihbit P-320-B) result in a net increase of the total price increase claimed which results in the total judgment claimed by each Plaintiff as shown on Exhibit P-320-B (and as claimed in Plaintiffs' proposed judgment).[1] The total per Mcf price increase shown in Column No. 5 of each of the Exhibits B through K does not include an increase in the Plaintiffs' award based on these adjustments but only represents a per

[1] These figures with respect to the Hall interests (Exhibit B) do not reflect a reduction in the claim of W. E. Hall, Jr., by the limitation of his claim to the period September, 1961, through May 24, 1969.

Mcf price claim based on the price differences shown on Plaintiffs' exhibits, less interest.

4.

The maximum lawful area base ceiling rates for the Northern Louisiana area during the period of recovery can be outlined as follows:

(A) For the period 1961 through 1971, the Federal Power Commission used guideline rates pursuant to its Statement of General Policy No. 61-1, 24 FPC 818 (1960). The guideline maximum lawful price for this period for sales of gas made in interstate commerce in Northern Louisiana (which would cover the Sligo Gas Field, Bossier Parish, Louisiana) was *$0.14 per Mcf* at 15.025 psia.

(B) In an order issued February 28, 1967, 37 FPC 400, the Commission instituted its area rate proceeding to determine just and reasonable rates for jurisdictional sales of natural gas by independent producers in what is designated as the "Other Southwest Area," which includes the Sligo Gas Field, Bossier Parish, Louisiana.

(C) On October 29, 1971, the Federal Power Commission issued Opinion No. 607 in the Other Southwest Area rate proceeding, 46 FPC 900 (1971).

(D) Many producers had filed for rate increases which were suspended by the Commission pending the Commission's determination of the area rate for the Other Southwest Area. With respect to proceedings pending at the time of the issuance of Opinion No. 607 and for the purpose of computing refunds due by producers who collected rates in excess of the rates specified below, the following rates were set in the Commission 1971 order solely for the purpose of deter-

mining refund obligations in rate increase proceedings then pending at the Commission:

For gas sold and delivered at the wellhead under contracts dated prior to January 1, 1961, the applicable rates were as follows:

For Gas Delivered Prior to 1/1/65	For Gas Delivered From 1/1/65-9/30/68	For Gas Delivered From 10/1/68-1/1/72
16.7¢	17.6¢	19.6¢

(E) The above prices were for the sole purpose of calculating refunds due on gas previously sold at prices collected under refund obligations in pending rate cases at the FPC. With respect to sales of gas delivered on and after January 1, 1972, the Commission prescribed the following just and reasonable area rates for gas sold and delivered at the wellhead under contracts dated prior to October 1, 1968:

From 1/1/72-9/30/73	Beginning 10/1/73
19.6¢	20.6¢

(F) An analysis of the Exhibits B through K attached hereto shows that the total price per Mcf claimed by Plaintiffs for each time period for each Plaintiff is in excess of the maximum lawful price that could be lawfully charged and paid under the Natural Gas Act.

5.

Mr. McLeod would also testify that he has reviewed the computations contained in the "Brief in Support of Plaintiffs' Motion for Adoption and Implementation of Final Judgment of the Louisiana Supreme Court" filed on April 18, 1979, and that the computations are incorrect, particu-

larly with reference to the calculations regarding the allocation for Plaintiff W. E. Hall contained on pages 10 and 11 of said brief.

Mr. McLeod would compute Plaintiff W. E. Hall's allocation as follows:

(A) W. E. Hall's claim for the period September, 1961, through May 24, 1969, based upon price differences as computed by the Plaintiffs for actual volumes delivered during the respective periods is $201,480.65 (this information is obtained from Exhibit P-347 and Exhibit P-322-I).

(B) From P-322-I Mr. McLeod would determine that 76.6 percent of the production for the entire period September, 1961, through December, 1975, occurred during the period September, 1961, through May 24, 1969.

(C) The total of Plaintiffs' adjustments for pertinent factors is $650,996.98. Applying 76.6 percent factor to that amount results in the amount of $498,663.69 adjustment for pertinent factors applicable to the period September, 1961, through May 24, 1969.

(D) Plaintiff W. E. Hall's percentage of the total damage claim for all Plaintiffs is 230,818.51/2,809,-199.08 which equals .08216524.

(E) Multiplying Mr. Hall's percentage of the claim times the amount of adjustment for pertinent factors applicable for the period September, 1961, through May 24, 1969,

$$.08216524 \times \$498,663.69 = \$40,972.82$$

results in $40,972.82 applicable to Mr. Hall's claim for the Plaintiffs' adjustment for pertinent factors.

(F) Then the total of W. E. Hall's claim as allocated would be as follows:

$201,480.65 - $40,972.82 = $160,507.83

(G) The Plaintiffs computations contained in their brief result in a claim of $172,552.37, resulting from an inconsistent allocation with respect to the adjustment for pertinent factors based on a ratio of time rather than a ratio of actual production. Based on Mr. McLeod's computation, Mr. W. E. Hall's claim should be limited to $160,507.83.

Number 79-1896

JUL 3 1980
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION TO ARKANSAS LOUISIANA GAS COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

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July, 1980

TABLE OF CONTENTS

		Page
I.	PRELIMINARY STATEMENT	1
II.	THE QUESTIONS PRESENTED BY ARKLA'S THREE PETITIONS FOR A WRIT OF CERTIORARI	4
III.	REASONS WHY ARKLA'S PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED	11
IV.	CONCLUSION	26
	APPENDIX	1a

INDEX TO CITATIONS

CASES:

Ammerman v. Miller, 488 F.2d 1285 (D.C. Cir. 1973) 25

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) .. 24

Arkansas Louisiana Gas Company v. Frank J. Hall, et al, Docket No. RI 76-28 (F.P.C. & F.E.R.C.) .. 2

Arizona Public Service Co., F.P.C. Docket Nos. E9280, E9281, E9282, E9283, ER77-188, F.E.R.C. Docket Nos. ER78-423 and ER78-430 19

Ballard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975) 25

Boston Edison Co., 50 F.P.C. 557 (1973) 19

Central Maine Power Co. v. F.P.C., 345 F.2d 153 (D.C. Cir. 1967) 19

Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976) 3, 5, 25

The City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979) 6, 19, 24

City of New Orleans, La. v. United Gas Pipe Line Co., 390 F.Supp. 861 (E.D. La. 1974) 5

Consumers Power Co., F.E.R.C. Docket No. 78-437 .. 20

Page

Dayton Power & Light Co., F.P.C. Docket No. ER77-546 (1978) 19, 24

Duke Power Corp., F.P.C. Docket No. E7513 19

Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971) 2, 5

Electric Energy, Inc. F.P.C. Docket ER77-176 19

George W. Garig Transfer v. Harris, 75 So.2d 27 (La. S.Ct. 1954) 25

Gulf Oil Corp. v. American-Louisiana Pipeline Co., 282 F.2d 401 (6th Cir. 1960) 3, 5, 25

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, Docket No. CA 75-1168 (Dist. Ct. W.D. La. 1976) 1

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, Docket No. 225,699, First Judicial District Court, Caddo Parish, Louisiana 2

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, 359 So.2d 255 (La.App.2d 1978) 2

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, 368 So.2d 984 (La.S.Ct. 1979) 2

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, 379 So.2d 1142 (La.App.2d 1980) 2, 10

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, Docket No. 67,225, S.Ct. La., application for cert. den. May 2, 1980 2

International Paper Co. v. F.P.C., 476 F.2d 121 (5th Cir. 1973) 5

Kansas City Power Co., F.E.R.C. Docket No. ER78-25 20

Louisiana-Nevada Transit Co. v. Dalton J. Woods, 393 F.Supp. 177 (W.D. Ark. 1975) 3, 5

Monsanto Co. v. F.P.C., 463 F.2d 799 (D.C. Cir. 1973) 5

Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U.S. 246 (1951) 12

Moss v. C.A.B., 521 F.2d 298 (D.C. Cir. 1975) 19

Page

New England Power Company, F.P.C. Docket No. E7729, F.E.R.C. Docket No. ER78-44 20

Niagara Mohawk Power Corp. v. F.P.C., 379 F.2d 153 (D.C. Cir. 1967) 6, 19

North States Power Company of Minnesota, F.E.R.C. Docket Nos. ER77-593, ER77-596, ER77-626, ER77-634 20

Oklahoma Gas & Electric Co., F.E.R.C. Docket No. ER78-423 19

Pan American Petroleum Corp., et al, F.P.C. Docket No. RI 63-481 6

Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961) 5

Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561, 566 (8th Cir. 1962) 5

Phillips Petroleum Co. v. F.P.C., 349 F.2d 535 (10th Cir. 1965) 5

Perrin v. Rodriguez, 153 So. 555 (La. 1934) 25

Plaquemines Oil and Gas Co. v. F.P.C., 450 F.2d 1334 (D.C. Cir. 1971) 6, 19, 23

Potomac Electric Power Co., F.E.R.C. Docket No. ER77-429 19

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 15

Rowan v. Allied Chemical Corp., 39 F.P.C. 64 (1968) 6

Shell Oil Co. v. F.P.C., 531 F.2d 1324 (5th Cir. 1976) 6

Skelly Oil Co. v. F.P.C., 532 F.2d 177 (10th Cir. 1976) 5

Skelly Oil Co., et al v. Phillips Petroleum Co., 339 U.S. 667 (1950) 5, 16

Southern Railway Co. v. United States, 412 F.Supp. 1122 (D.Ct. for D.C. 1976) 19

L. E. Smith, et al, F.P.C. Docket No. RI 67-110 6

State of Louisiana v. F.P.C., 503 F.2d 844 (5th Cir. 1974) 5

Page

R. H. Stearns Co. v. United States, 391 U.S. 54 (1934) 25

United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958) 5

United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1945) 5

United States v. Peck, 102 U.S. 64 (1880) 25

United States v. Radio Corp. of America, 385 U.S. 348 16

Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972) appeal dismissed and certiorari denied, 409 U.S. 1052 (1972) 2-3, 5, 6, 25

MISCELLANEOUS:

Corbin on Contracts, § 1266 (1951 ed.) 25

Corpus Juris Secundum, 17A, Contracts, § 468a and b (1963) 25

Restatement of Contracts, §§ 294 and 295 (1932) 25

5 S. Williston, Contracts, § 677 (3rd ed. 1961) 25

Louisiana Civil Code Articles 1901, 1903, 1930 and 2040 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NUMBER 79-1896

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION TO ARKANSAS LOUISIANA GAS COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

I.

PRELIMINARY STATEMENT

In light of the definitive judgments and orders as heretofore rendered by a United States district court,[1] three Louisi-

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[1] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, Docket No. CA 75-1168 (Dist. Ct. W.D. La. 1976), "Judgment of Remand" rendered on February 2, 1976 pursuant to 28 U.S.C. 1447 (c) and (d).

ana state courts,[2] the Federal Power Commission (F.P.C.)[3] and the Federal Energy Regulatory Commission (F.E.R.C.),[4] as "collaborative instrumentalities of justice", in connection with six years of duplicative and parallel litigation involving a private breach of contract and damage dispute between the fifteen individual respondents herein and Arkansas Louisiana Gas Company (Arkla), it is now abundantly clear that Arkla, the wrongdoer in the private breach of contract case, has from September 1961 through December 1975 *wrongfully injured* and *damaged* respondents in the *same* wrongful manner that the Kerr-McGee Corporation, Cities Service Gas Company, the Gulf Oil Corporation and the Louisiana-Nevada Transit Company also *wrongfully* injured and damaged other citizens of this Nation by likewise uncooperatively breaching and violating private legal and contractual rights under similar private gas sales contracts. See: *Eastern Petroleum Co., et al* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236

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[2] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, Docket No. 225,699, First Judicial District Court, Caddo Parish, Louisiana, "Judgment" rendered on October 14, 1977, "Judgment" rendered on December 5, 1977, and "Judgment" rendered on May 17, 1979.

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, 359 So.2d 255 (La.App.2d 1978).

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, 368 So.2d 984 (La.S.Ct. 1979).

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La.App.2d 1980).

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, Docket No. 67,225, Supreme Court of Louisiana, application for certiorari *denied* on May 2, 1980.

[3] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "Orders" issued on March 8, 1976 and November 8, 1976, respectively.

[4] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "Orders" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively.

(Okla. 1972), appeal *dismissed* and cert. *den.*, 409 US. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); and *Louisiana-Nevada Transit Co.* v. *Dalton J. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

Arkla, the wrongdoer in this private breach of contract case, has as part of its egregious and continuing effort to unjustly take advantage of and to profit by virtue of its own uncooperative breach of contract and continued legal fault from September 1961 through December 1975 at respondents' loss, damage, detriment and expense now filed *three* separate petitions for a writ of certiorari with this Court, ie. Docket Nos. 78-986, 78-1789 and 79-1896.

As the fifteen individual respondents herein have previously demonstrated in their responses filed in Docket Nos. 78-986 and 78-1789 and will herein again demonstrate, this Court should in the interest of fundamental justice *deny* all *three* of Arkla's petitions for a writ of certiorari because it has now been conclusively established and confirmed that under the factual circumstances of this private breach of contract and damage dispute and the applicable cases respondents' recovery of compensatory damages from Arkla's *own* excessive private corporate *profits* [5] for the actual losses and damages sustained and incurred by respondents with respect to their extracted liquid hydrocarbons, plant products and dry or residue natural gas due to Arkla's continued breach of contract from 1961 through 1975 does *not* in any possible way adversely involve

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[5] During the fourteen years that Arkla wrongfully injured and damages respondents by virtue of its continued breach of contract and uncooperative withholding of all of the true facts from respondents for fourteen years, Arkla, a corporate conglomerate that owns and operates many different private businesses and diverse private enterprises, has amassed *over* $1,000,000,000.00 in private corporate assets; grossed *over* $5,000,000,000.00 in private corporate earnings; reaped *over* $1,000,000,000.00 in excessive private corporate profits; and distributed *over* $275,000,000.00 in cash dividends to its own private stockholders.

or affect the Commission's (F.P.C. and F.E.R.C.) regulatory responsibility under section 4(d) of the Natural Gas Act to protect "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce from 1961 to 1972.

II.

THE QUESTIONS PRESENTED BY ARKLA'S THREE PETITIONS FOR A WRIT OF CERTIORARI

In light of the adverse judgments and orders from the United States district court, the Louisiana state district court, the Louisiana state court of appeal, the Louisiana supreme court, the F.P.C. and the F.E.R.C. with respect to the factual, jurisdictional and breach of contract issues as definitively resolved and adjudicated adversely to Arkla in connection with this private breach of contract and damage dispute during the past six years, Arkla has filed *three* petitions for a writ of certiorari with this Court. Arkla in its *three* petitions has rather diffusely and in an interwoven fashion continuously reasserted three alleged errors with respect to the adverse judgments and orders of the *six* tribunals (three state courts and three Federal tribunals) which have heretofore consistently resolved and adjudicated the factual, jurisdictional and breach of contract issues as presented in the instant private breach of contract case adversely to Arkla.

Arkla, in its *first* petition for a writ of certiorari as filed with this Court on December 18, 1978, Docket No. 78-986, erroneously asserted and specified two alleged errors, to wit:

(1) The United States district court for the western district of Louisiana, the Louisiana state district court, the Louisiana state court of appeal, the Louisiana supreme court, the F.P.C. and the F.E.R.C. have consistently erred in unanimously determining that the Louisiana state courts had the legal jurisdiction and authority to try, resolve and adjudicate a private breach of contract and damage dispute between respondents and Arkla; and

(2) Alternatively, even if the Louisiana state courts had the legal jurisdiction and authority to construe and interpret

> a "most favored nations" clause, as contained in the 1952 private gas sales contract negotiated and perfected between respondents and Arkla, in order to determine and confirm the *"true intentions"* of the parties when they negotiated and perfected said private contract on January 11, 1952, the Louisiana courts consistently erred in their application of ordinary rules of private contract law to the actual *evidence* adduced at the trial of this case on its merits in determining and confirming the *"true intentions"* of the parties when they negotiated and perfected the private contract on January 11, 1952.

Arkla's first two specifications of alleged error obviously related to the jurisdictional issue and the liability or breach of contract issue which had been unanimously resolved and adjudicated adversely to Arkla by the three Louisiana state courts and the three Federal tribunals in connection with the instant private breach of contract and damage case. In light of the specific factual circumstances of this private breach of contract and damage case and the applicable and controlling cases,[6] this Court by virtue of an "Order" issued on October 1, 1979 correctly and properly *denied* Arkla's *first* petition for a writ of certiorari in Docket No. 78-986.

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[6] Skelly Oil Company, et al v. Phillips Petroleum Co., 339 U.S. 667 (1950); United Gas Pipe Line Co. v. Mobile Gas Corporation, 350 U.S. 332 (1956); United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958); Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); Gulf Oil Corp. v. American-Louisiana Pipeline Co., 282 F.2d 401 (6th Cir. 1960); Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561, 566 (8th Cir. 1962); State of Louisiana v. F.P.C., 503 F.2d 844 (5th Cir. 1974); Skelly Oil Co. v. F.P.C., 532 F.2d 177 (10th Cir. 1976); Monsanto Co. v. F.P.C., 463 F.2d 799 (D.C. Cir. 1972); International Paper Co. v. F.P.C., 476 F.2d 121 (5th Cir. 1973); City of New Orleans, La. v. United Gas Pipe Line Co., 390 F.Supp. 861 (E.D.La. 1974); Louisiana-Nevada Transit Co. v. Dalton J. Woods, 393 F.Supp. 177 (W.D. Ark. 1975); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); Phillips Petroleum Co. v. F.P.C., 349 F.2d 535

Arkla, in its *second* petition for a writ of certiorari as filed with this Court on May 29, 1979 in Docket No. 78-1789, reasserted the same two specified errors as set forth in its *first* petition in Docket No. 78-986 and added a third specification of error, which related in a limited fashion to the "quantum of compensatory damages" issue, by erroneously asserting that:

(3) Even if the Louisiana courts had the legal jurisdiction and authority to try, resolve and adjudicate the private breach of contract and damage dispute between respondents and Arkla and even if the Louisiana courts had properly determined that Arkla had wrongfully injured and damaged respondents from 1961 to 1975 by continuously breaching and violating respondents' private legal and contractual "most favored nations" rights from 1961 through 1975 and by uncooperatively withholding all of the true facts concerning its continued breach of contract from respondents from 1961 to 1975, under our American System of Justice respondents may not recover compensatory damages out of Arkla's own private corporate profits for the actual losses and damages which they have sustained and incurred with respect to their dry or residue natural gas from September 1961 through September 1972 *because* Arkla through its own uncooperative breach of contract and continued legal fault from 1961 to 1975 absolutely prevented and effectively precluded respondents from timely preparing and prospectively filing routine notices setting forth their "severable" and "contractually authorized prices" for their dry or residue natural gas under their private 1952 contract with the F.P.C. pursuant to section 4(d) of the Natural Gas Act for the limited period September 1961 through September 1972.

(10th Cir. 1965); and Shell Oil Co. v. F.P.C., 531 F.2d 1324 (5th Cir. 1976); Merle M. Rowan v. Allied Chemical Corp., 39 F.P.C. 64 (1968), "order" issued January 17, 1968; L. E. Smith, et al, Docket No. RI 67-110, "order" issued January 9, 1967; Pan American Petroleum Corp., et al, Docket Nos. RI 63-481, et al, "orders" issued October 9, 1964 and December 3, 1964, respectively; Western Natural Gas Co. v. Cities Service Gas Co., Docket No. G-14958, "order" issued July 24, 1967; Plaquemines Oil & Gas Co. v. F.P.C., 450 F.2d 1334 (D.C. Cir. 1971); The City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979); and Niagara Mohawk Power Corp. v. F.P.C., 379 F.2d 153 (D.C. Cir. 1967).

In attacking the Louisiana supreme court's "judgment" of March 5, 1979 and the Louisiana district court's "judgment on remand" from the Louisiana supreme court dated May 17, 1979, Arkla, the wrongdoer, has by virtue of the unconscionable "Catch-22" theory as set forth in its *second* petition in Docket No. 78-1789 demanded that this Court reduce the quantum of compensatory damages as awarded to respondents in the private breach of contract case from approximately $2,700,000.00 to $1,700,000.00. Respondents, in their response to Arkla's *second* petition in Docket No. 78-1789 and in their "Application For a Waiver" of the prospective section 4(d) notice filing requirements, as formally filed with the F.E.R.C. on May 24, 1979, have heretofore demonstrated that Arkla's unconscionable "Catch-22" attempt to legally rely upon and to take advantage of its own uncooperative breach of contract and continued legal fault from 1961 to 1975 in order to improperly escape and unilaterally evade its own independent and private contractual responsibility to respond in compensatory damages out of its *own* excessive private corporate *profits* for the actual losses and damages that respondents have sustained and incurred with respect to their dry or residue natural gas for the limited period September 1961 through September 1972 is absolutely abhorent to fundamental American Justice. Moreover, respondents have heretofore demonstrated that in light of the applicable "orders" of the F.P.C. and the F.E.R.C. in the related and parallel administrative proceeding respondents' recovery of compensatory damages from Arkla's own excessive private corporate profits for the actual losses and damages which they have sustained and incurred with respect to their dry or residue natural gas for the limited period September 1961 through September 1972 due to Arkla's continued breach of contract and uncooperative legal fault does *not* in any possible way adversely involve or affect the Commission's (F.P.C. and F.E.R.C.) regulatory responsibility to protect "the relevant public interest" against "excessive prices" for dry or residue gas sold in interstate commerce from 1961 to 1972 under section 4(d) of the Natural Gas Act.

Further, as respondents have conclusively demonstrated in connection with their response to Arkla's *second* petition in Docket No. 78-1789 and in their formal "Application For a Waiver", as filed with the F.E.R.C. on May 24, 1979, Arkla's self-serving contention that respondents' recovery of compensatory damages out of its own private corporate profits for that portion of the actual losses and damages sustained and incurred with respect to their dry or residue natural gas for the limited period 1961 to 1972 might conflict with the regulatory purpose of section 4(d) of the Natural Gas Act is entirely erroneous and has obviously been asserted by Arkla in a desperate effort to unjustly preserve a portion of its *own* excessive private corporate *profits* (*over* $120,000,000.00 each year) and to maintain the extremely high level of cash dividends which Arkla distributes to its private stockholders each year (*over* $35,000,000.00 each year) at respondents' loss, damage, detriment and expense. It is now abundantly clear that the F.E.R.C. has properly rendered Arkla's unconscionable "Catch-22" prospective notice filing contention absolutely "*moot*" by fully performing its "*review function*" under section 4(d) of the Natural Gas Act with respect to respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract as negotiated and perfected by respondents and Arkla for the limited period September 1961 through September 1972.

As respondents have heretofore demonstrated and will hereinafter again demonstrate, the F.E.R.C. by performing its "*review function*" under section 4(d) of the Natural Gas Act with respect to respondents' "severable" and "contractually authorized prices" for their dry or residue gas under the private 1952 contract between respondents and Arkla for the "certain period" September 1961 through September 1972 has by virtue of its "orders" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively, correctly determined and conclusively confirmed that respondents' "severable" and "contractually authorized prices" for their dry or residue gas under the 1952 private contract for the "certain period" September 1961 through September 1972 were well *below* and fully con-

sistent with the Commission's established and approved "maximum, lawful, just and reasonable area rate ceilings" for the sale of dry or residue gas in interstate commerce from 1961 to 1972 and, hence, respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract between respondents and Arkla do *not* in any possible way adversely involve or affect the Commission's regulatory responsibility to protect "the relevant public interest" against "excessive prices" for dry or residue natural gas sold in interstate commerce from September 1961 through September 1972 under section 4(d) of the Natural Gas Act.

Arkla's *second* petition for a writ of certiorari in Docket No. 78-1789 specifically attacked those portions of the Louisiana supreme court's "judgment" dated March 5, 1979 (Arkla's appendix A) and the "judgment" of the Louisiana state district court on remand from the Louisiana supreme court dated May 17, 1979 (Arkla's appendix C) which granted respondents a recovery of compensatory damages for all of their actual losses and damages from 1961 to 1975, including that portion of their actual losses and damages which respondents had sustained and incurred from September 1961 to September 1972 with respect to their dry or residue natural gas due to Arkla's continued breach of contract and uncooperative withholding of all of the true facts from respondents from 1961 to 1975, i.e. approximately $1,000,000.00. After Arkla filed its *second* petition (Docket No. 78-1789) with this Court on May 29, 1979, Arkla "appealed" the Louisiana supreme court's "judgment" of March 5, 1979 and the Louisiana district court's "judgment" on remand from the Louisiana supreme court dated May 17, 1979 to a Louisiana court of appeal on the erroneous basis that "new issues" were for the first time being presented in this private breach of contract case.

In that Arkla's last state court "appeal" obviously presented *no* "new issues" and was in light of the Louisiana supreme court's "judgment" of March 5, 1979, the F.P.C.'s "order" of

March 8, 1976, the F.P.C.'s "order" of November 8, 1976, the F.E.R.C.'s "order" of April 25, 1979, the F.E.R.C.'s "order" of May 18, 1979, and the F.E.R.C.'s "order" of July 16, 1979 completely void of any merit whatsoever, Arkla's last state court "appeal" was *denied* on January 22, 1980 by the Louisiana second circuit court of appeal.[7]

Nevertheless, Arkla on May 30, 1980 filed a *third* petition for a writ of certiorari in connection with this private breach of contract case in Docket No. 79-1896 wherein Arkla has again diffusely reasserted and rehashed the same alleged "issues" which were previously presented by its petitions in Docket Nos. 78-986 and 78-1789. In that this Court correctly and properly *denied* Arkla's *first* petition for a writ of certiorari in Docket No. 78-986 on October 1, 1979, the only remaining "issue" as presented by Arkla's *second* petition (Docket No. 78-1789) and Arkla's *third* petition (Docket No. 79-1896) is:

> Whether under the specific facts of this private breach of contract case respondents' recovery of compensatory damages out of Arkla's own private corporate profits in the sum of $1,000,000.00 for that portion of the actual losses and damages that respondents sustained and incurred with respect to their dry or residue natural gas from September 1961 to September 1972 due to Arkla's continued breach of contract and uncooperative withholding of all of the true facts from respondents from 1961 to 1975 adversely affects or involves the Commission's regulatory responsibility to protect "the relevant public interest" against "excessive prices" for dry or residue natural gas sold in interstate commerce from 1961 to 1972 under section 4(d) of the Natural Gas Act?

As respondents will herein demonstrate, the F.E.R.C. by actually performing its section 4(d) *"review function"* with respect to respondents' *"severable"* and *"contractually authorized prices"* for their dry or residue natural gas under the 1952 private contract for the "certain period" September 1961 to

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[7] *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La.App.2d 1980).

September 1972 has from a substantive standpoint conclusively confirmed the wholly erroneous and meritless nature of Arkla's bald assertions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896 concerning the "justness and reasonableness" of respondents' "contractually authorized prices" for their residue natural gas *and* has effectively rendered these erroneous allegations absolutely *moot*. Further, from a technical procedural standpoint, the F.E.R.C.'s granting of respondents' pending "Application For a Waiver" dated May 24, 1979, for "good cause shown", will also completely render *moot* Arkla's unconscionable and self-serving "Catch-22" contentions as repeatedly set forth in its petitions in Docket Nos. 78-1789 and 79-1896 whereby Arkla is attempting to improperly rely upon and unjustly take advantage of the fact that Arkla's own continued breach of contract and uncooperative legal fault from 1961 to 1975 rendered it absolutely *impossible* for respondents to prospectively make the routine notice filings with the F.P.C. from 1961 to 1972 concerning their "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract.

III.

REASONS WHY ARKLA'S PETITIONS IN DOCKET NOS. 78-1789 AND 79-1896 SHOULD ALSO BE DENIED

A. Arkla's Erroneous and Self-Serving Contentions In Docket Nos. 78-1789 and 79-1896 Have Been Completely Eliminated and Rendered Moot by the F.E.R.C.'s Performance of Its Section 4(d) Review Function in the Related and Parallel Administrative Proceeding.

In squarely addressing and correctly answering Arkla's erroneous contention that respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the 1952 private contract for the "certain period" September 1961 to September 1972 exceed and violate the F.E.R.C.'s "maximum, lawful, just and reasonable area rate ceilings" for the sale of residue natural gas in interstate commerce from 1961 to 1972, the F.E.R.C. has now fully performed its section 4(d) "review function" with respect to

respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the 1952 private contract for the "certain period" September 1961 through September 1972. Specifically, in addressing Arkla's wholly erroneous and self-serving contentions with respect to the "justness and reasonableness" of respondents' "contractually authorized prices" for their residue natural gas under the 1952 private contract for the 1961 to 1972 period, the F.E.R.C. and its staff counsel have consistently and correctly concluded that:

(1) *August 23, 1978*—The F.E.R.C.'s staff counsel correctly concluded that respondents' recovery of compensatory damages for their actual losses and damages sustained with respect to their dry or residue gas from September 1961 through December 1975 would *not* adversely affect the Commission's regulatory responsibility to protect "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce:

> "Only contracts executed prior to April 3, 1961 may contain favored nations clauses. Therefore, contracts involving jurisdictional sellers which contain these clauses will become relatively infrequent.
>
> Concern that a court might order Arkla to pay excessive rates in the guise of contract damages is not warranted under the circumstances of this case. Even if respondents are entitled to a rate increase, the applicable ceiling rates under the Commission's regulations will impose a limitation on the damages respondents may receive from a court. . .
>
> Therefore, the issue in this case is limited to the damages respondents may receive up to these ceiling rates; the question whether such damages would constitute an unreasonable and unjust rate, which would be in the exclusive jurisdiction of the Commission, Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U.S. 246 (1951), is not present. Therefore, the Commission's regulatory responsibility to protect consumers from excessive rates is not involved."

(2) *April 25, 1979*—The F.E.R.C. in properly performing its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" under the private 1952 contract for their dry or residue

gas for the "certain period" September 1961 through September 1972 properly "ordered" that:

"To aid it in its determination of the jurisdictional questions in this case this Commission needs some additional information.

The Supreme Court of Louisiana stated in an opinion in a parallel case [1] that:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

The trial court in Louisiana stated: [2]

> The evidence demonstrates that the price paid to the United States per Mcf of gas was below the maximum area rate. . .

This Commission is interested in the basis on which the Louisiana Courts awarded damages for gas. We want to know at what price per Mcf of gas the courts awarded damages to the Hall plaintiffs. We also want to know what damages were demanded by the plaintiffs in the Louisiana courts.

(A) Hall, *et al.* to file with this Commission within ten days:

(1) A copy of the complaint filed in the Louisiana proceedings, including all amendments to that complaint;

(B) The parties to these proceedings to file with the Commission within ten days:

(1) A summary of the damages awarded by the Louisiana Courts. The summary shall show what price per Mcf of gas the Louisiana Courts decided

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[1] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, No. 62,560, March 5, 1979, p.12, n.7.

[2] *Hall* v. *Arkansas Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana; No. 225,699, October 14, 1977.

that the Hall plaintiffs were entitled to broken down by time periods. We are specifically interested in damages for the gas as opposed to damages awarded for any extracted liquids. A party may wish to provide a breakdown of the total damages showing the damages per Mcf for the gas, and the damages per Mcf for the liquids. But each party must show the damages per Mcf for the gas for every time period. We also stress that we want a summary showing what the Louisiana Courts actually did rather than any attempt to relitigate the damages determined by the Louisiana Court. In its summary each party shall explain the evidentiary basis of its summary and shall include copies of the evidence it believes was actually used by the courts in determining damages; . . ."

(3) *May 18, 1979*—The F.E.R.C. in properly performing its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972 in order to fully carry out its regulatory responsibility of protecting "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce from 1961 to 1972 correctly concluded that:

"The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. . .

On April 25, 1979, we issued an 'Order Requesting Additional Information to Supplement Record.' Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed applicable area ceiling rates. . .

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate. . .

. . . [W]e find that the rates requested are within what the Commission has determined to be the zone of reasonableness. . . .

The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. . .

On the facts of this case, the damages do not exceed applicable area ceiling rates. . .

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above."

(4) *June 3, 1979*—The F.E.R.C. in an "Amici Curiae Brief" as filed with this Court in Docket No. 78-986 *again* confirmed the positive results of its having fully performed its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the certain period 1961 to 1972, as well as from 1972 through 1975, to wit:

"The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See e.g., Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). However, absent adverse effects on the interests protected by the regulatory scheme—for example, prices in excess of established ceilings—the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission. Otherwise, the Commission and the federal

courts would be inundated by 'a vast current of [contract] litigation indubitably arising under State law****.' Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 673 (1950). . .

Nor does construction of the favored nations clause on the basis of the intentions of the contracting parties affect the Commission's regulatory responsibilities. Resolution of the dispute turns on evidence of dealings between the parties relevant only to this case. . .

The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (United States v. Radio Corporation of America, supra, 385 *.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act. Under the National Gas Act and well established federal law, jurisdictional sellers of gas are entitled only to rates set forth in their filed rate schedules or (to the extent they are excused from filing such schedules) under their contract pricing provisions, but in no event in excess of Commission established ceilings. . .

Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App. infra, 15a), there was no question concerning the reasonableness of the rates for the Commission to consider."

(5) *July 16, 1979*—The F.E.R.C. in the related and parallel administrative proceeding issued an "Order Denying Rehearing" wherein the Commission in connection with its performance of its section 4(d) "review function" in pertinent part concluded that:

"On May 18, 1979, this Commission issued an 'Order Declining Jurisdiction After Reconsideration of the Issue on Remand.' Applications for rehearing and reconsideration of that order have been received from all parties in this proceeding. Those applications are denied."

Certainly, the positive results from the F.E.R.C.'s performance of its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972 have completely eliminated and rendered *moot* the wholly erroneous and self-serving contentions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896 with respect to the "justness and reasonableness" of respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972, as well as from October 1972 through December 1975.

B. Pursuant to the Comments and Suggestions of the F.E.R.C. and Its Staff Counsel Respondents Have Formally Filed For and Shown Good Cause For A Waiver of the Prospective Notice Filing Requirements of Section 4(d) of the Natural Gas Act for the Limited Period September 1961 to September 1972.

After the F.P.C. had properly deferred the resolution and adjudication of the private breach of contract and damage dispute between respondents and Arkla to the Louisiana courts by virtue of its "orders" of March 8, 1976 and November 8, 1976, respectively, and after the Louisiana supreme court rendered its final and definitive judgment in the private breach of contract case between respondents and Arkla on March 5, 1979, the F.E.R.C.'s staff counsel concluded and suggested that in order for respondents to completely remove and eliminate any technical or theoretical conflict between respondents' recovery of compensatory damages for the actual losses and damages which they had sustained and incurred with respect to their residue natural gas from 1961 to 1972 due to Arkla's continued breach of contract and Arkla's uncooperative withholding of all of the true facts from respondents from 1961 to 1975 *and* the Commission's primary jurisdiction and authority to grant "waivers" of the prospective notice filing requirements of section 4(d) of the Natural Gas

Act, respondents should in the related and parallel administrative proceeding formally "seek and obtain" a "waiver" of the prospective section 4(d) notice filing requirements with respect to their "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the limited period September 1961 to September 1972. Specifically, the F.E.R.C.'s staff counsel on April 16, 1979 concluded and suggested that:

> "The question of whether to waive the filing requirement of § 4(d) of the Natural Gas Act under these circumstances is within the primary jurisdiction of the Commission. Moreover, it is important, we believe, for the Commission to exercise its jurisdiction in this case insofar as it relates to the filing requirements under the Natural Gas Act and the Commission's regulations pertaining thereto. Aside from the Commission's expertise in such matters, the decisions on these issues should be consistent.
>
> The Commission is reconsidering the prior orders issued by the FPC in this proceeding which have been remanded from the U.S. Court of Appeals. Hall has not requested in this proceeding that the Commission waive the filing requirements of § 4(d) of the Natural Gas Act. Therefore, it would be appropriate for the Commission, in addition to asserting that it has primary jurisdiction, to reassert the position taken by the FPC in its June 4, 1976 order in this proceeding that Hall is not entitled prior to October 10, 1972 to any rate in excess of that on file with the Commission and in effect under its FERC Gas Rate Schedule No. 4 unless or until it seeks and obtains waiver of the requirements. Staff adheres to the position taken in its brief that it is unnecessary for the Commission to exercise its primary jurisdiction to determine whether the favored nation clause at issue here has been triggered."

After respondents were able to fully comply with the F.E.R.C.'s "order" dated April 25, 1979 in connection with the F.E.R.C.'s performance of its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas for the "certain period" September 1961 to September 1972 and after

the FE.R.C. had completed its section 4(d) "review function" on May 18, 1979, respondents on May 24, 1979 formally filed an "Application For a Waiver" of the prospective section 4(d) notice filing requirement of the Natural Gas Act with the F.E.R.C. for the limited period September 1961 to September 1972 in order to completely eliminate and render *moot* Arkla's unconscionable "Catch-22" attempt to legally rely upon and to unjustly take advantage of the fact that Arkla by virtue of its own continued breach of contract and uncooperative withholding of all of the true facts from respondents from 1961 to 1975 absolutely *prevented* and *precluded* respondents from prospectively preparing and filing the routine notices with the F.P.C. from 1961 to 1972. A true copy of respondents' "Application For a Waiver", as filed with the F.E.R.C. on May 24, 1979, was attached as appendix A to respondents' brief in opposition to Arkla's *second* petition in Docket No. 78-1789.

In light of the numerous other cases [8] in which the F.P.C., the F.E.R.C. and the appropriate courts have during the past *twenty* years heretofore consistently granted scores of "waivers" of the identical prospective notice filing requirements of

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[8] Plaquemines Oil & Gas Co. v. FPC, 450 F.2d 1334 (D.C. Cir. 1971); The City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979); Dayton Power & Light Co., Docket No. ER77-546 (1978); Central Maine Power Co. v. FPC, 345 F.2d 875 (1st Cir. 1965); Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (D.C. Cir. 1967); Moss v. C.A.B., 521 F.2d 298 (D.C. Cir. 1975); Southern Railway Co. v. United States, 412 F.Supp. 1122 (Dist.Ct. for D.C. 1976); Duke Power Company, FPC Docket No. E-7513, "order" of February 9, 1970; New England Power Company, FPC Docket No. E-7729, "order" of May 19, 1972; Boston Edison Co., 50 F.P.C. 557 (1973); Arizona Public Service Co., FPC Docket Nos. E-9280, E-9281, E-9282, and E-9283, "order" of March 21, 1975; Arizona Public Service Co., FPC Docket No. ER77-188, "letter order" of April 8, 1977; Electric Energy, Inc., FPC Docket No. ER77-176, "letter order" of April 11, 1977; Potomac Electric Power Co., FERC Docket No. ER77-429, "order" of June 30, 1977; Oklahoma Gas & Electric Co., FERC Docket No. ER78-423, "order" of June 30, 1978; Arizona Public Service Co., FERC

section 4(d) of the Natural Gas Act and section 205(d) of the Federal Power Act, respectively, to numerous other citizens of this Nation, it is clear that the F.P.C., the F.E.R.C. and the courts have during the past twenty years consistently found "good cause" for the granting of similar requests for "waivers" in numerous other cases where the moving applicants have shown that:

(1) The *"contractually authorized prices"* for the period of time in question, as determined by the *"true intentions"* of the parties to each specific private contract in question, were *below* and, hence, consistent with the *"in-line prices"* and/or the *"maximum, lawful, just and reasonable area rate ceilings"* as previously approved and established by the Commission in light of *"the relevant public interest"* against *"excessive prices"* for residue natural gas and/or electricity sold in interstate commerce;

and

(2) The seller's failure and/or inability to timely prepare and prospectively make the notice filings setting forth his *"contractually authorized prices"* under his privately negotiated contract with the Commission was due to *"excusable"*, *"inequitable"*, and/or *"unavoidable"* circumstances.

With respect to the *first part* of the F.P.C.'s and the F.E.R.C.'s fair two-part test and objective standard for determining "good cause" for the granting of "waivers" of the prospective notice filing requirements of the Natural Gas Act and the Federal Power Act, respondents in support of their

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Docket Nos. ER78-429 and ER78-430, "order" of July 13, 1978; Consumers Power Co., FERC Docket No. 78-437, "order" of July 21, 1978; North States Power Co. of Minnesota, FERC Docket Nos. ER77-593, ER77-596, ER77-626, ER77-633, ER77-634, ER 78-38, "order" of December 2, 1977; Kansas City Power & Light Co., FERC Docket No. ER78-25, "order" of November 17, 1977; New England Power Co., FERC Docket No. ER78-44, "order" of December 9, 1977; Utah Power & Light Co., FERC Docket No. ER78-216, "order" of June 30, 1978.

pending "Application For a Waiver" dated May 24, 1979 have conclusively shown and established that:

> Respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972 were well *below* the Commission's established and approved "maximum, lawful, just and reasonable area rate ceilings" for the 1961 to 1972 period and, hence, said "contractually authorized prices" did *not* in any possible way contravene or adversely affect the Commission's regulatory purpose of protecting "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce.

With respect to the *second part* of the F.P.C.'s and the F.E.R.C.'s fair two-part test and objective standard for determining "good cause" for the granting of "waivers" of the prospective notice filing requirements of the Natural Gas Act and the Federal Power Act, respondents in support of their pending "Application For a Waiver" dated May 24, 1979 have conclusively shown and established that:

> Respondents were absolutely *prevented* and *precluded* from timely making the routine section 4(d) notice filings from 1961 to 1972 in that it was physically and humanly *impossible* for them to have timely prepared and filed the routine notices setting forth their "contractually authorized prices" for their residue natural gas with the Commission from September 1961 through September 1972 *because* Arkla, through its own uncooperative legal fault and continued breach of contract, had effectively withheld and uncooperatively concealed *all* of the true, relevant and material facts necessary for respondents' preparation of the notice filings from respondents from September 1961 through December 1975.

After respondents definitively concluded the breach of contract case on May 17, 1979 and formally filed their "Application For a Waiver" with the F.E.R.C. on May 24, 1979, the F.E.R.C. has taken the following action:

(1) *July 16, 1979*—The F.E.R.C. issued an *"Order Denying Rehearing"* wherein the Commission in pertinent part concluded and stated that:

"The Commission has also received an application for waiver of Section 4(d) of the Natural Gas Act. The application for waiver will be dealt within a separate order. This denial of rehearing does not affect or prejudge the application for waiver."

(2) *February 11, 1980*—The F.E.R.C. in an "Amici Curiae Brief" as filed with this Court in connection with Arkla's *second* petition in Docket No. 78-1789 concluded and stated that:

"In 1974 respondents sued Arkla in a Louisiana state court for breach of contract; . . .

. . . After several decisions and a remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission ultimately denied Arkla's petition on May 18, 1979 (App., infra, 1a-15-A). The Commission held that under the circumstances of this case, it would decline to exercise primary jurisdiction in respect of what it viewed as essentially a dispute over contract issues that do not require the Commission's expertise or implicate policies under the Natural Gas Act (id. at 7a-13a). It concluded that those were matters that could and should be resolved by the state courts, . .

After the decision of the court of appeal, the Supreme Court of Louisiana, although denying Arkla's petition for review, granted respondents' petition for review and reversed that part of the court of appeal's decision limiting respondents' recovery to the period after 1972. The Supreme Court of Louisiana concluded that Arkla had prevented respondents from making appropriate filings with the Commission before 1972 by not informing respondents of its lease payments; that the Commission would have approved respondents' filings for an increase; and that respondents should therefore be allowed to recover damages for the entire period between September 1961 through December 31, 1975. The instant petition seeks this Court's review of that decision.

> On May 24, 1979, respondents filed with the Commission and application for a waiver of the Commission's filing requirements, presumably on the assumption that if the Commission granted such a waiver, the filed rate doctrine would not bar their recovery of damages for the period prior to 1972. The Commission has not yet acted on that application. . . .
>
> Because the filed rate doctrine is an important principle of federal rate regulation, we normally would urge the Court to grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of Louisiana. However, if the Commission should grant the pending application for waiver of the filing requirement, the issue may well be moot. In the circumstances, the Court may wish to hold the petition to await the Commission's action."

In light of and consistent with its fair two-part test and objective standard for determining "good cause" for the granting of "waivers" of the identical prospective notice filing requirements of the Natural Gas Act and the Federal Power Act and the numerous prior cases in which it has heretofore during the past *twenty* years consistently granted numerous "waivers" to other citizens of this Nation, certainly the F.E.R.C. will in due course grant respondents' pending "Application For a Waiver" dated May 24, 1979 and, hence, grant to the respondents herein the *same equal justice* and the *same equitable remedy* that the F.E.R.C. and the United States court of appeals for the District of Columbia Circuit have heretofore properly granted and justly afforded to: (i) *37 other sellers* of residue natural gas in interstate commerce with respect to their "contractually authorized prices" under privately negotiated contracts for their residue natural gas for the "certain period" 1961 through 1966 in the leading case involving the *granting* of "waivers" of the prospective notice filing requirements of section 4(d) of the Natural Gas Act, i.e. *Plaquemines Oil and Gas Company* v. *Federal Power Commission*, 450 F.2d 1334 (D.C. Cir. 1971); (ii) to Dayton Power

and Light Company with respect to its "contractually authorized prices" under a privately negotiated contract in the leading case involving the *granting* of a "waiver" of the identical prospective notice filing requirements of section 205(d) of the Federal Power Act, i.e. *Dayton Power & Light Company*, Docket No. ER77-546 (1978), and the *City of Piqua, Ohio* v. *Federal Energy Regulatory Commission*, 610 F.2d 950 (D.C. Cir. 1979); and (iii) to scores of other citizens in numerous other cases involving the *granting* of "waivers" of the prospective notice filing requirements of the Natural Gas Act and the Federal Power Act during the past twenty years with respect to their "contractually authorized prices" under their privately negotiated contracts.

Certainly, the F.E.R.C.'s consistent and ultimate granting of respondents' pending "Application For a Waiver" dated May 24, 1979 will further completely eliminate and render *moot* the unconscionable "Catch-22" contentions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896.

In the final analysis, the well established rules and fundamental principles of law, equity, fairness and justice, as confirmed and applied in three leading and often cited decisions of this Court, eloquently answer and completely rebut the obviously unjust and self-serving "Catch-22" contentions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896, to wit:

(1) *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975):

> "And where a legal injury is of an economic character,
>
> > '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867)."

(2) *United States* v. *Peck,* 102 U.S. 64 (1880):

> "[T]he conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance. . . It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned."

(3) *R. H. Stearns Co.* v. *United States,* 291 U.S. 54 (1934):

> "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect "this is your own act, and therefore you are not damnified."' *Dolan* v. *Rodgers,* 149 N.Y. 489, 491; 44 N.E. 167; and *Imperator Realty Co.* v. *Tull,* 228 N.Y. 447, 457; 127 N.E. 263; quoting *West* v. *Blakeway,* 2 Man. & G. 828, 839. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."

See also: *Restatement of Contracts,* §§ 294 and 295 (1932); 5 S. Williston, *Contracts,* § 677 (3rd ed. 1961); 17A C.J.S., *Contracts,* § 468a and b (1963); *Corbin on Contracts,* § 1266 (1951 ed.); Articles 1901, 1903, 1930 and 2040 of the *Louisiana Civil Code, Ballard* v. *El Dorado Tire Co.,* 512 F.2d 901 (5th Cir. 1975); *Ammerman* v. *Miller,* 488 F.2d 1285 (D.C. Cir. 1973); *Perrin* v. *Rodriguez,* 153 So. 555 (La. 1934); *Gulf Oil Corp.* v. *American-Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir. 1960); *George W. Garig Transfer* v. *Harris,* 75 So.2d 27 (La.S.Ct. 1954); *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and cert. *den.,* 409 U.S. 1052 (1972); and *Cities Service Gas Company* v. *F.P.C.,* 535 F.2d 1278 (D.C. Cir. 1976).

IV.

CONCLUSION

For the foregoing reasons, Arkla's petitions for a writ of certiorari in Docket Nos. 78-1789 and 79-1896 should also be denied.

Respectfully submitted,

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July, 1980

APPENDIX

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION

CONTENTS

APPENDIX A. Page

Arkla's Internal Correspondence dated January 15, 1974 ..... 1a

APPENDIX B.

Arkla's Internal Correspondence dated January 17, 1974 ..... 2a

APPENDIX C.

Arkla's Internal Correspondence dated November 20, 1961 ..... 4a

APPENDIX D.

Arkla's Internal Correspondence dated December 27, 1961 ..... 5a

APPENDIX E.

United States Government Memorandum dated October 22, 1962 ..... 6a

APPENDIX F.

Section 2(n) of Arkla's 1961 Protective Lease Contract with the United States Government covering 2419.3 acres in the Sligo Gas Field, Bossier Parish, Louisiana 7a

APPENDIX G.

Arkla's Internal Correspondence dated November 6, 1962 ..... 8a

APPENDIX H.

Arkla's November 15, 1962 "Letter Contract" with United States Government 9a

APPENDIX I.

Arkla's Public Filing with the Federal Securities & Exchange Commission dated August 19, 1975 ..... 11a

Contents Continued

Page

APPENDIX J.
Pertinent findings and conclusions of the United States District Court for the Western District of Louisiana in its "Judgment of Remand" dated February 2, 1976 ..... 14a

APPENDIX K.
Pertinent findings and conclusions of the F.P.C. in its "Order" issued on March 8, 1976 ..... 15a

APPENDIX L.
Pertinent findings and conclusions of the F.P.C. in its "Order" issued on November 8, 1976 ..... 16a

APPENDIX M.
Pertinent findings and conclusions of the Louisiana State District Court in its "Judgment" dated October 14, 1977 ..... 18a

APPENDIX N.
Pertinent findings and conclusions of the Louisiana State Court of Appeal in its "Judgment" rendered on May 1, 1978 ..... 20a

APPENDIX O.
Pertinent findings and conclusions of the Louisiana Supreme Court in its "Judgment" of March 5, 1979 ..... 23a

APPENDIX P.
Pertinent findings and conclusions of the Louisiana State Court of Appeal in its "Judgment" of January 22, 1980 ..... 27a

RESPONDENTS' APPENDIX A

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at Shreveport, Louisiana
January 15, 1974

To: Mr. G. L. Hetherwick

From: Jim Monk

Subject: D. B. McConnell, et al—Sligo Field, Louisiana

Enclosed is a copy of a letter dated January 11, 1974, concerning prices paid from the above referenced field. Please draft a reply to this letter stating that we have not exceeded the price stated in the contract. Therefore, the "Favored Nations" part of this contract has not been activated. I have enclosed the permanent file for your reference.

FILED IN EVIDENCE IN SUIT No. 225-699
December 3, 1976

/s/ SIGNATURE ILLEGIBLE
Deputy Clerk

JMH:jj

Enclosures

RESPONDENTS' APPENDIX B

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at Shreveport, Louisiana
January 17, 1974

To: Mr. Jim Monk

From: Gilbert L. Hetherwick

Subject: D. B. McConnell, *et al*
Sligo Field, Louisiana

Attached is a draft of a letter responding to Will Hall's letter of January 11, 1974, in accordance with your request of January 15, 1974.

I drafted this response like you requested to simply state that we are not paying a higher price than the price in his contract. However, that is not what he asked for. He asked for specific information concerning all contracts in the Sligo Field and particularly information concerning the price we are paying the United States Government (see page 2 of his letter).

I assume from your request that you meant to deliberately not give him what he had asked for. However, I would point out that Will Hall is a lawyer and our response looks like we may be putting him off. All he has to do is draft a petition and file it in order to sue us and then he can subpoena all the contracts he wants information about. This would be troublesome and probably expensive for Arkla and I would suggest that you would consider giving him more specifically the information he asks for unless there is some reason not to.

Your file is returned herewith.

Very truly yours,

/s/ GLH

FILED IN EVIDENCE IN SUIT No. 225-699
December 3, 1976

/s/ SIGNATURE ILLEGIBLE
Deputy Clerk

GLH/fm

Attachments

RESPONDENTS' APPENDIX C

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at Shreveport, Louisiana
November 20, 1961

To: Mr. J. C. Templeton

From: B. E. Harrell

Subject: U.S.A. Lease—Sligo

Received November 20, 1961
J. S. TEMPLETON

In answer to your letter of November 17, 1961, concerning royalty price applicable to the above lease, this is to advise that I have no particular opinion as to what price should be paid to royalty owners by ALG in this field. However, I do wish to caution you that we have a favored nations contract with W. E. Hall et al in this field and the price they are receiving is presently $0.08797 per MCF. I do not know whether our paying any royalty owner a higher price than $0.08797 would activate this favored nations clause; however, if the attorneys feel that there is no danger of a royalty price activating a favored nations clause, then I have no objection to paying the Government at a price substantially higher than $0.08797.

I wanted to bring this out, however, since any activation of favored nations clauses in this area would cost ALG several million dollars increase in cost of gas annually.

/s/ BILL

BEH:dm

cc: Mr. D. W. Weir
Mr. Robert Roberts, Jr.

RESPONDENTS' APPENDIX D

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at December 27, 1961.

To: Mr. John W. Denhollem

From: Robert Roberts, Jr.

Subject: Operating Agreement—Barksdale Field Lease, Sligo Area, Bossier Parish, Louisiana.

This is in response to your memorandum of December 18, 1961, requesting my comment on recent correspondence concerning the effort to agree on a balancing provision (Section 3) for the Operating Agreement of February 1, 1961.

After our telephone conversation yesterday I find that in my file is a copy of the amendment submitted by Mississippi River Fuel Corporation with their letter of June 14, 1961. Shortly afterward I commented on Mississippi River's draft and send you herewith a copy of my memorandum to you of July 25th in that connection. I do not know that there is anything that I can add to the comments I made in that letter.

Texas Gas' letter of December 13th emphasizes the difficulty of the problem and the difference in point of view of the various parties: You do not want to buy any gas or set a price, and obviously several of the parties want to do just that.

As requested, your file is returned herewith.

Very truly yours,

/s/ Robert Roberts, Jr.

Encs—
RRJr:m

cc—Messrs. J. C. Templeton
M. C. Bubenzer
J. C. Cooke, Jr.

RESPONDENTS' APPENDIX E

Memorandum

Date: 10-22-62

To: Files

From: N. Orvis Frederick

Subject: BLM-A-054491, Sligo Field, Louisiana

J. C. Templeton, Vice President, Arkansas-Louisiana Gas Company, Shreveport, came in at 9:30 on Friday, October 19, 1962, to discuss the $34,723.45 deficit (as of 8-1-62) in royalty payments, mostly due to the 8.547¢ per MCF value placed on gas taken in kind being below reasonable value and below/ all sales from the same lease by their co-lessees.

Mr. Templeton is aware of the higher prices being paid for 85% of the gas from this lease, but maintained Ark-La is buying a great deal of gas from other producers in the field at the 8.5¢ +/MCF price by 1952 contracts (referred to in his letter to us dated 4-13-62); feared the other producers would be dissatisfied if Ark-La paid us more; and suggested a negotiated price. He was advised that these were unacceptable; that royalty would continue to be computed on the Union Producing Company price (our letter of 3-27-62) and in accordance with the lease instrument and regulations; and that Ark-La had the right of appeal.

He expressed little interest in an appeal but wished to have time to consult their attorney, who will be back from vacation in about a week, and then present the matter to the Company board (?), and that we would hear further from him in 10 to 14 days. It seemed most likely that Ark-La will agree to recalculate their royalty payments in agreement with our royalty statements.

/s/ N. Orvis Frederick
N. Orvis Frederick

Copy to Shreveport
NOF:cc

RESPONDENTS' APPENDIX F

Section 2(n) of Arkla's 1961 Protective Lease Contract with the United States Government Covering 2419.3 Acres in the Sligo Gas Field, Bossier Parish, Louisiana

"Lessee agrees: If owner, or operator, or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products obtained under a lease or permit granted by the United States."

RESPONDENTS' APPENDIX G

ARKANSAS LOUISIANA GAS COMPANY

Shreveport, Louisiana
November 6, 1962

Mr. Robert Roberts, Jr.

J. C. Templeton

Sligo Royalty Price

The Advisory Council approved my recommendation that ALG increase its royalty price to that requested in the U.S. Geological Survey letter of March 27, 1962. Please prepare a letter advising the U.S.G.S. which will protect us legally. Copies should be sent to all of the partners owning an interest in the lease.

FILED IN EVIDENCE IN SUIT No. 225-699
September 27, 1976

/s/ LARRY BASS
Deputy Clerk

JCT:me

cc: Mr. J. G. Cooke, Jr.

RESPONDENTS' APPENDIX H

ARKANSAS LOUISIANA GAS COMPANY

Shreveport, Louisiana

November 15, 1962.

Mr. J. R. Reeve, Regional Oil and Gas Supervisor,
United States Geological Survey,
521 Wright Building,
115 West 3rd Street,
Tulsa 3, Oklahoma.

In re: Oil and Gas Lease BLM-A-054491,
Sligo Field, Louisiana, Parcel No. 3

Dear Sir:

This refers to your letter to Natural Gas and Oil Company of October 12, 1962 and conference between the undersigned and you in your office in Tulsa on October 19th.

By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of $0.117432 per mcf until January 1, 1962; $0.130252 until January 1, 1967 and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for

Arkansas Louisiana Gas Company's share of the gas at the above figures.

Very truly yours,

/s/ J. C. TEMPLETON
J. C. Templeton,
Vice President.

cc: Washington 11/21/65

cc: Murphy Corporation

Union Producing Company

Texas Gas Exploration Corporation

Natural Gas and Oil Company

RESPONDENTS' APPENDIX I

BLANCHARD, WALKER, O'QUIN & ROBERTS
First National Bank Building
Post Office Drawer 1120
Shreveport, Louisiana 71163

Telephone (318) 231-8858

August 19, 1975

AIR MAIL
Securities and Exchange Commission
Attention: Mr. Blair Corkran
Division of Corporation Finance
Washington, D.C. 20549

RE: Arkansas Louisiana Gas Company,
Registration No. 2-54218, Form S-9

Dear Sirs:

This is in response to telephone conversation on Monday, August 18, yesterday, between Mr. Corkran and the undersigned as attorney for Arkansas Louisiana Gas Company. Mr. Corkran inquired as to whether the pending lawsuit of Frank J. Hall and fourteen other plaintiffs against Arkansas Louisiana Gas Company (the "Company"), No. 225,699 on the docket in the First Judicial District Court of Louisiana within and for the Parish of Caddo, should be described in the preliminary prospectus dated July 21, 1975, a part of the above registration, under the caption "Legal Proceedings" on page 19.

The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company. The plaintiffs brought the suit on a contract between them (or in certain instances their predecessors) with a number of other sellers not party to the suit and the Company for the sale of gas to be produced from certain gas

production properties in the Sligo Gas Field, Bossier Parish, Louisiana. The contract was executed in January, 1952, and its term extends into 1980. The suit claimed that the agreed prices under the contract, by reason of payments made by the Company to the Federal Government under an oil and gas lease, beginning in 1961 were increased and had not been properly paid by the Company. The suit asked for a declaratory judgment, an accounting, and unspecified damages in the amount of $1.5 million. The defendant answered the suit denying plaintiffs' version of the agreement and claiming that the prices to the plaintiffs had been properly calculated and paid. After extensive preliminary proceedings, the plaintiffs on June 12, 1975 superseded their original demands with an amended petition on which the action is now pending. The amended petition appears to be for the same demand and on the same legal and factual basis as to the plaintiffs' claim, but instead of asking for an accounting, seeks damages for breach of the contract in an amount of $8,755,000 and cancellation of the contract. The Company believes that it has paid plaintiffs all sums due under the contract and experts to prevail on the principal issue of the suit. In addition, there are a number of other issues, the decision of which will be material if plaintiffs should prevail on their claim; for example, prescription (limitation), whether the Federal Power Commission has sole jurisdiction over plaintiffs' demand, the effect on the agreement and its interpretation and performance of the Natural Gas Act and the Federal Power Commission's regulations thereunder. It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.

The reason this lawsuit was not reported in the prospectus is that, in our opinion, it is not "material" in the sense in which the Commission uses that term in its rules with regard to the preparation of prospectuses. If the entire eight million

dollar claim should be considered at issue in the suit, it would affect earnings by additional gas purchase expense with an offset to the extent of 50% by reducing income taxes, and, as we understand the proper accounting, the additional expense would be spread over the fourteen years back to 1961. If the entire amount at risk in the suit should be considered as affecting the year in which a judgment might become final, the risk, $4,377,000, would be barely more than 10% of the net income of the Company for the year ending May 31, 1975, as reported in the prospectus, and could be compared also with the income from continuing operations before income taxes (58.60 million dollars), and with the income from continuing operations (39.24 million dollars). The amount claimed is obviously less than 10% of current assets and less than 5% of total assets—tests of materiality which are mentioned in certain of the Commission's rules. The annual reduction in income would be in the order of $315,000.

We have no objection to describing the lawsuit in the prospectus; but since it is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospectus, we concluded that it should not be described in the prospectus.

We would be glad to have your conclusions on this point.

Very truly yours,

/s/ Robert Roberts, Jr.

Blanchard, Walker, O'Quin & Roberts

RRJr/er

cc: Eugene R. Sullivan, Esq.
David G. Ormsby, Esq.

RESPONDENTS' APPENDIX J

Pertinent Findings and Conclusions of the United States District Court for the Western District of Louisiana In Its "Judgment On Remand" Dated February 2, 1976.

"This suit was filed in Louisiana State Court seeking damages for alleged breach of contract. . .

This claim is clearly merely a claim for breach of a contract, and would be determined by state law. . .

Stated in simplest form, the plaintiffs' arguments in the Second Petition are:

1. Plaintiffs and defendant have a contract under state law.
2. Defendant has violated the contract.
3. Plaintiffs may recover under state law.
4. This claim is not affected by federal law.
5. If it is, the plaintiffs still have a claim.

The plaintiffs' claim that they have the status of small producers is not an essential element of their cause of action. See Gully v. First National Bank, 1936, 299 U.S. 109, 57 S.C. 96, 81 L.Ed. 70. . .

See Eastern Petroleum Co. v. Kerr-McGee Corp., 7th Cir. 1971, 447 F.2d 569, where a case involving similar issues was removed to federal court on the ground of diversity but state law was applied. The jurisprudence relied upon in the motion for reconsideration indicates the correctness of the remand. . .

Accordingly the case is REMANDED to the First Judicial District Court, Parish of Caddo, State of Louisiana, defendant to bear all costs. . .

The stay order is vacated, and the remand to state court shall take effect without further orders."

RESPONDENTS' APPENDIX K

Pertinent Findings and Conclusions of the F.P.C. In Its "Order" Issued On March 8, 1976.

"Arkansas Louisiana Gas Company (Arkla) on September 11, 1975, filed a petition for a declaratory order in the above-entitled proceeding contending that the 'favored nations' clause in the January 11, 1952 contract with Frank J. Hall, et al. (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. . .

The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the Pan American case, supra, or the Rowan case, supra. This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.

For the reasons set forth above, Arkla's petition for declaratory order filed on September 11, 1975 in the above-entitled proceeding is denied."

RESPONDENTS' APPENDIX L

Pertinent Findings and Conclusions of the F.P.C. In Its "Order" Issued On November 8, 1976.

"On June 30, 1976, Frank J. Hall, et al. (Respondents) filed a Petition for Clarification and Amplification of the Commission's order dated June 4, 1976, whereby the Commission denied Arkansas Louisiana Gas Company's (ARKLA) petition for rehearing. On July 6, 1976, ARKLA filed a Limited Application for Rehearing, or in the Alternative, Clarification, of the Commission's June 4 order.

ARKLA originally had sought a determination that the 'favored nations' clause in its January 11, 1952 contract with Respondents was not triggered by certain royalty payments made to the United States Government by ARKLA. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue.

Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its 'Other Southwest Area Rate' Opinion Nos. 607 and 607-A. The respective area base rate ceiling for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From January 1, 1965 Thru September 30, 1968	From October 1, 1968 Thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.

Respondents also request that the Commission set forth and state:

> '1. That the Federal Power Commission pursuant to the Natural Gas Act, has not, since September, 1961 to the present date, regulated, limited or restricted the rates or prices which the respondents herein, if contractually authorized, could and should have been paid for their liquid hydrocarbons, gasoline, and plant products extracted from the wet or casinghead gas and which were sold to Arkansas Louisiana Gas Company pursuant to the January 11, 1952 'Most Favored Nation' contract and the related Arkansas Louisiana Gas Company division order contracts.'

While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream.[4] Consequently, if a contract provides for severable payments for the natural gas including the liquefiable hydrocarbons contained therein and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under their sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract. Since, as we indicated in our order issued March 8, 1976, herein, it is appropriate for a court to resolve contract questions pertaining to the sale of natural gas, it is clear that a court would also have jurisdiction to decide this contractual issue. . .

The Commission's Order Denying Application for Rehearing issued June 4, 1976, in the above-entitled docket number, is hereby clarified and amplified as set forth in the body of this order.

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[4] *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (CADC 1973)."

RESPONDENTS' APPENDIX M

Pertinent Findings and Conclusions of the Louisiana State District Court In Its "Judgment" Dated October 14, 1977.

"The defendant in this case customarily listed the lessor as a 'seller' on its required division orders and required their signatures thereto. Essentially the same form was used by the defendant whether the product produced was oil, gas or condensate . . . these forms, in fact, listed the royalty owners as 'sellers'.

. . . the evidence shows the word 'seller' to have a broader usage and more general meaning than the more restricted definition [defendant] now asserts. . .

Defendant's principal argument is that in making payment to the United States under its lease, Exhibit P-45, that it was paying royalty as lessee, not purchasing gas as pipeline purchaser. On the contrary, defendant was acting in a dual capacity at one and the same time. It was paying royalty as lessee and purchasing gas as pipeline purchaser within the meaning and intent of Section 8(d).

For all of the above reasons it is the opinion of this Court that the acceptance of gas produced from the mineral lease executed by the United States, Exhibit P-45, by the defendant as a pipeline operator and payment therefor to the United States constituted a purchase of gas from another party seller within the meaning of the contract of plaintiff, Exhibit P-1.

The evidence demonstrates that the price paid to the United States per Mcf of gas was below the maximum area rate. . .

Defendant has pled prescription of one, three and ten years. The facts of this case are that the lease from the United States, Exhibit P-45, was not even of record in Caddo (Bossier) Parish, Louisiana, nor was the information available giving the prices being used to compute the Government's royalty payment until plaintiffs were able to obtain the information about June 25, 1974. Suit was filed July 18, 1974. Prescription does not run against one who is ignorant of the existence of facts that would entitle him to bring a suit, when such ignorance is not willful and does not result from negligence. Plaintiffs were not advised of the facts in this case until they succeeded in obtaining a letter dated June 25, 1974, from Mr. F. L. Stelzer which included the lease from the United States, Exhibit P-45, and the letter of establishing the price set by the Government, Exhibit P-65, and the letter in which defendant acceded thereto, Exhibit P-82. Under this state of facts prescription does not run against plaintiffs and defenadnt's pleas of prescription is to no avail."

RESPONDENTS' APPENDIX N

Pertinent Findings and Conclusions of the Louisiana State Court of Appeal In Its "Judgment" Rendered On May 1, 1978.

"Defendant's initial argument is in error because the relief sought is not that of a rate increase, but is instead a claim for damages arising under state contract law. Although the state court must adhere to the provisions of the Natural Gas Act and the pertinent regulations of the FERC in its determination of damages, it is a proper forum for adjudication of a state contract law dispute. Furthermore, the Natural Gas Act evinces no purpose to abrogate private rate contracts. *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S. Ct. 373 (1956). The act recognizes the rights of the parties to rates established by individual contract and does not alter ordinary contractual relationships where the controversy is one of ordinary contract law. *Cities Service Gas Company* v. *Federal Power Commission*, 255 F.2d 860, *cert. den.* 358 U.S. 837, 79 S.Ct. 61 (1958); *Skelly Oil Co.* v. *Federal Power Commission*, 532 F.2d 177 (1976); *Phillips Petroleum Co.* v. *Federal Power Commission*, 349 F.2d 535 (1965). A claim founded on state contract law does not lose its character just because the Natural Gas Act is in some way involved. *Pan American Petro Corp.* v. *Superior Court of Del.*, 366 U.S. 656, 81 S.Ct. 1303 (1961).

. . . The major issue in the case before us is one of construing the provisions of a contract and the intentions of the parties at the time of the execution of the contract. Such a determination does not require the specific technical expertise of the FERC. Although the FERC may have original jurisdiction in this case, it does not have exclusive original jurisdiction, but rather shares concurrent original jurisdiction with the state court.

Plaintiffs contend payments made to the United States by defendant in its dual capacity as lessee and pipeline purchaser are tantamount to a 'purchase from another seller,' as this term was intended in the price adjustment clause of their 1952 gas sales contract with defendant. . .

The evidence shows that during the lengthy negotiations between defendant and the principal plaintiffs in 1952, defendant's prime objective in renegotiating the preexisting contract was to commit the plaintiffs to a long-term contract. As an inducement for a twenty-eighty-year-term the officials of the defendant corporation offered to include a Favored Nations clause. The request by plaintiffs to have the clause pivot on the highest market price being paid by anyone in the field was rejected by defendant.

The handwritten notations made at that time by the defendant's attorney who prepared the final draft of the agreement show that his instructions from the official of defendant handling the negotiations were to prepare a price adjustment clause based on 'highest price we pay for gas in the Sligo Field.' Thereafter, agreement on the subject clause was reached which tied it to the highest price being paid by defendant in the Sligo Field.

There is no evidence suggesting the description of the contracting parties as 'Buyer' and 'party sellers' was intended to have any restrictive legal meaning and the terms were apparently standard phrases contained in a Favored Nations clause of another contract used as a model by the attorney drafting the agreement. Indicative of the fact that little thought was given to these terms having any significant restrictive effect on the broad application of the clause is the absence of a definition of the words 'Buyer' and 'party seller' within the agreement. Although defendant strenuously urges that the terms 'Buyer,' 'seller,' and 'purchase' as used in the

Favored Nations Clause has a restrictive legal meaning and limits the applicability of the clause to 'sales' of gas, defendant's actions subsequent to execution of the contract show a tendency on its part to use sales terminology in a very broad manner to also include royalty interests in the preparation of division orders and the payment of royalty to lessors from a bank account styled 'Gas Purchase Account.'

The general rule of contract interpretation concerning a Favored Nations clause is that 'in order to give effect to the intention of the parties the Court must consider the circumstances surrounding the making of the contract, its subject, and the situation and relation of the parties at the time of its making; and the construction placed upon the contract by the parties to it as reflected by their words and acts is entitled to great, if not controlling influence in ascertaining the parties' understanding of its terms.' (Emphasis added) Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (1975).

For the foregoing reasons, we conclude the trial court was correct in holding that the payment by defendant for gas produced under the lease from the United States was within the scope of the price adjustment clause of plaintiffs' contract.

The evidence shows that in the fall of 1961 several of the officials of defendant were concerned that the royalty price negotiated with the United States might have the effect of activating the price adjustment clause of plaintiff's contract. The question was submitted to defendant's attorneys who advised that payment of royalty would not have this legal effect. Defendant did not make any disclosure to plaintiffs at that time or subsequently which would have allowed plaintiffs the opportunity to seek a determination before an appropriate tribunal. In early 1974 when inquiries were made by plaintiffs, the officials of Arkla were uncooperative and evasive in answer to questions concerning the possible purchase of gas from the United States."

RESPONDENTS' APPENDIX O

Pertinent Findings and Conclusions of the Louisiana Supreme Court In Its "Judgment" Of March 5, 1979.

"Plaintiffs, royalty interest owners, working interest owners, overriding royalty interest owners and unleased mineral interest owners, instituted this suit against Arkansas-Louisiana Gas Company to recover damages arising from an alleged breach of a gas purchase contract. . . .

The trial court first held that payments made by defendant to the United States government under the terms of the lease constituted a 'purchase from another party seller' within the meaning of the favored nations clause contained in the January 11, 1952 gas purchase contract entered into between plaintiffs and defendant. The court reasoned that defendant, in making payments to the United States government under its lease, was acting in a dual capacity: it was paying royalty as lessee and purchasing gas as pipeline purchaser. The court determined that defendant failed to advise plaintiffs of this fact or pay them the higher, contractually-authorized price. Having held that defendant breached the original gas purchase contract, the trial court next concluded that defendant would only be liable for damages (measured by the difference between the price paid the United States Government and the price paid plaintiffs). . .

The court of appeal affirmed the trial court, holding that defendant had breached the favored nations clause of its contract with plaintiffs and that plaintiffs were entitled to damages measured by the difference between the price paid by defendant to the United States government and the price paid to plaintiffs (after applying adjustments for pertinent factors). . .

We note, at the outset, that this controversy involves plaintiff's claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are

founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues. Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts.

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). . .

Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition who prevents the fulfillment. George W. Garig Transfer v. Harris, supra; Southport Mill v. Friedrichs, supra; Morrison v. Minton, supra. This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act. See Cox v. Department of Highways, 252 La. 22, 209 So.2d 9 (1968).

To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commisison, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government.

. . . Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. To hold otherwise would be in clear contravention of the spirit and intent of article 2040 and the jurisprudence of this court.[6]

---

[6] We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, '[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition.' 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La.St.L.Inst. transl. 1959).

At trial a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and if proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. . . It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[7]

In sum, it is our opinion that plaintiffs are entitled to a recovery of an award of damages measured by the difference between the price defendant paid the United States government and the price defendant paid plaintiffs (after applying various adjustments for pertinent factors) for the entire period of defendant's breach of contract from September 1961 through December 31, 1975.

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[7] We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission."

RESPONDENTS' APPENDIX P

Pertinent Findings and Conclusions of the Louisiana State Court of Appeal In Its "Judgment" of January 22, 1980.

"The central issue in this appeal involves the sufficiency of the evidence used in comparing the difference in the price provisions of the two contracts, one contract being the gas purchase contract in 1952 containing the favored nation clause, and the other being the lease contract with the United States of America in 1961, payments under which have been construed as activating the favored nation clause of the other contract.

Under the 1961 lease, Arkla paid the government for the value of liquid hydrocarbons extracted from the natural gas and for the dry (residue) gas remaining after the extraction. . .

Arkla insists that the FERC ceiling on gas, whether *wet* (before extraction of LCH [liquid hydrocarbons]) or *dry* (after extraction of LHC) is the sole basis upon which damages should have been assessed and that the price it pays or paid to the United States for the extracted LHC is not a factor to be considered. . .

Again we determine that for the purpose of giving effect to the favored nation clause—section 8 of the contract, the higher price the United States began to receive from Arkla in 1961 for gas and for LHC is the basis upon which to assess and measure the amounts plaintiffs should have begun to receive monthly from Arkla in 1961 for its gas and LHC. Arkla conditionally concedes as much in its first reply brief:

> 'The values paid by Arkla to the United States for extracted plant products can and must be considered under this Court's May 1, 1978, judgment [359 So.2d 255 (La. App. 2d Cir.)] as a pertinent factor to determine the overall price paid to the government on a per Mcf basis.

> The Court has held that it is a pertinent factor and Arkla cannot attack that holding on this appeal. However, when the Court made that decision, the effect of the application of that pertinent factor on the Plaintiffs' monetary recovery was left to the Trial Court on remand. The Trial Court has considered the issues on remand and has rendered an award in its May 17, 1979, judgment, that is *again* grossly in error. This time, the [trial] Court failed to consider the limitations placed upon the award by the Natural Gas Act. The Plaintiffs award should be limited [to a total of $1,609,067.11] . . .'

We cannot agree that the trial court erred.

We reiterate that the purpose of the favored nation or price adjustment clause is to protect the seller under a long-term contract from price discrimination. A contract with favored nations provisions should be interpreted broadly, and not restrictively, to fully effect the provisions. 359 So.2d at p. 262. See also *Eastern Petroleum Company* v. *Kerr-McGee Corporation*, 447 F.2d 569 (C.A. 7th, 1971). Arkla paid the United States for gas and for LHC. Arkla paid plaintiffs for gas and LHC. . .

We have again reviewed in the original record, summaries and the testimony of the plaintiff-expert at whose direction they were prepared. We do not depart from our 1978 observation. . .

The Supreme Court of Louisiana agreed and FERC so understood.

> 'The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.' Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5.

. . . On the *basic contract question* (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas *and* for LHC products severed from its gas. In effect Arkla paid the government and the plaintiffs for *wet* gas. The eventual price was determined by the MCF after extraction of LHC and by the price for the LHC. The price plaintiffs received for its gas after extraction of LHC and for the LHC was less than what the government received.

. . . The price provisions of plaintiffs' contract and of the United States' contract have been compared and the difference has been determined. Plaintiffs should receive for their gas and for the LHC in the gas the higher amount the United States was receiving for its gas *and* the LHC in the gas. *Gas* in the 1952 contract includes the LHC. Each contract contains price provisions for gas and for LHC. When the price provisions of the two contracts, comparing the pertinent factors, are considered, plaintiffs are entitled to the damages assessed.

Plaintiffs are not entitled to damages for frivolous appeal. At Arkla's cost, judgment is AFFIRMED."

FILED
AUG - 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-1896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	1
CONCLUSION	9

TABLE OF AUTHORITIES

Arkansas Louisiana Gas. Co. v. Hall, et al., FERC Docket No. RI76-28	2
Ashland Oil & Refining Co. v. F.P.C., 421 F.2d 17 (6th Cir. 1970)	5
Atlantic Richfield Co. v. Northern Natural Gas Co., No. CA3-76-1548-G (N.D. Tex. Dec. 5, 1977)	5
City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979)	6
Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581 (1945)	5
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	1
Evco v. Jones, 409 U.S. 91 (1972)	9
Hughes Tool v. Trans-World Airlines, 409 U.S. 363 (1973)	5
Independent Oil & Gas Association of W. Virginia, F.E.R.C. Op. No. 77 (March 4, 1980)	7
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)	5, 6
Northern Natural Gas Co. v. Kansas Corp. Comm., 372 U.S. 84 (1963)	5
Shell Oil Co., 29 F.P.C. 498 (1963)	7
Socony Mobil Oil Co. v. Brooklyn Union Gas Co., 299 F.2d 692 (5th Cir. 1962), cert. den. 371 U.S. 887 (1962)	5
Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., —— U.S. ——, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979)	5

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ARGUMENT

A.

Respondents' brief opposing certiorari in this case must certainly be unique in that it does not refer to, discuss, nor attempt to justify [1] the Louisiana Court of Appeal's opinion and decree which we seek by our petition to reverse. That judgment, entered January 22, 1980, was the *first* judgment of the Louisiana courts for a sum of money ($2,700,000, with interest) which survived the appellate process in Louisiana. The other judgments of the Louisiana courts which Petitioner has sought to have reversed here, on certiorari, in No. 78-986 and in No. 78-1789, adjudged liability and remanded the case to the trial court for determination of amount.[2]

On the facts found by the Louisiana appellate court (App. C, pp. 105a, *et seq.*, discussed at Petition, pp. 13, *et seq.*), it is certain that the amount of the judgment sought to be reviewed here, representing the price of interstate natural gas sold by Respondents to Petitioner for resale, exceeds by a very large amount the maximum prices for that gas permitted under the Natural Gas Act by the Federal Energy Regulatory Commission's regulations.

Neither the Louisiana Court of Appeal in its opinion nor Respondents in their brief here has even attempted to reconcile the state court's judgment with the Natural Gas Act. Adverting again to the fact that prior to January 22, 1980, there was never in this suit a judgment of a Louisiana appellate court, based on specific facts and for a specific sum of money, we call this Court's attention to the fact that Respondents' argument against our specification of the amount of this judgment as error consists solely

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[1] Otherwise than by the formal chronology of the proceedings contained on page 10 of Respondents' brief.

[2] The rule, as to finality of a state court judgment, illustrated by this Court's decisions in cases such as *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469 (1975), seems to indicate that Petitioner was required to treat these earlier decisions of the Louisiana courts as final and reviewable.

(aside from conclusory rhetoric) of the quotation from a number of documents, all of which antedated the judgment under review.

Excerpts from these documents selected by Respondents reflect the regulatory principle that Respondents cannot collect a rate in excess of the just and reasonable rate established by the Federal Energy Regulatory Commission. The issue of whether or not the rate increase awarded by the Louisiana state courts, when added to the existing rate, exceeds the just and reasonable rate is currently pending at the Federal Energy Regulatory Commission in Arkansas Louisiana Gas Co. v. Hall, *et al.*, Docket No. RI76-28.

B.

Respondents have devoted a section of their brief in opposition to the grant of certiorari to a futile attempt to demonstrate that:

> ". . . the Federal Energy Regulatory Commission has now fully performed its Section 4 (d) 'review function' with respect to respondents' 'severable' and 'contractually authorized prices' for their dry or residue gas under the 1952 private contract . . ."

and that their request to the Federal Energy Regulatory Commission for a waiver of the filing requirement of Section 4 of the Natural Gas Act will be granted.

Petitioner would observe that the Federal Energy Regulatory Commission has not yet acted on Respondents' waiver application. Until action is taken on Respondents' waiver application, it is difficult to understand the basis for Respondents' claim that the Federal Energy Regulatory Commission has "fully performed its Section 4(d) 'review function' " of the just and reasonable nature of the rate increase awarded by the state courts. Respondents themselves argue that their waiver application requires the Federal Energy Regulatory Commission to determine that the rate increase is just and reasonable. Resp. Brief, p. 20. Furthermore, Respondents' contention that they sold

"dry or residue gas" under their contract wholly ignores the finding of the Louisiana Court of Appeal which is directly to the contrary. The holding of the Louisiana Court of Appeal is that Respondents' contract provided for a price for gas including the liquefiable content confirming Petitioner's showing that the rate increase awarded by the state courts when added to the existing rate exceeds the just and reasonable rate.

We also call the Court's attention to the demonstration in our petition for certiorari and in No. 78-1789 (pages 8-10) that the judgment below contravenes the rate filing requirements of the Natural Gas Act and is therefore an unlawful intrusion by a state court upon a matter reserved for the federal administrative authorities. Respondents' application for a waiver of the filing requirements of the Natural Gas Act was made to the Federal Energy Regulatory Commission in order to circumvent these filing requirements. In response to this Court's invitation in No. 78-1789, the Solicitor General filed a brief which stated:

> "As we stated in our Brief as Amici Curiae in No. 78-986 (at 15-17), we believe the Supreme Court of Louisiana erred in holding that respondents are entitled to damages from petitioners for the period from 1961 to 1972. This holding, we believe, is contrary to a basic and well established principle of rate regulation known as the filed rate doctrine, under which a person 'can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

The Solicitor General also stated in his conclusion that, because the filed rate doctrine is an important principle of federal regulation, the Louisiana court's decision ignoring that doctrine should not be allowed to stand.

Respondents' brief relies wholly on quotations from orders of the Federal Power Commission and its successor, the Federal Energy Regulatory Commission, which were included in their opinions declining to exercise jurisdiction in passing on the interpretation of the rate contract in-

volved. The statements in the Commission's orders "that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract" were made upon the basis of Respondents' arguments that the state courts had so interpreted the contract. Resp. Br., pp. 13-14. The judgment of which we now seek review is a direct holding to the contrary—that is, that the contract provided for a price for gas including the liquefiable content.[3] A similar situation exists concerning the Commission's earlier statement that the rates requested "are within what the Commission has determined to be the zone of reasonableness." This statement was made on the basis of Respondents' characterization of the state court claim which has been shown to be in error.[4]

Those statements, which were set forth as grounds for the Commission's conclusion to decline to exercise jurisdiction, have been conclusively proved by the judgment of January 22, 1980, of the Court of Appeal to be erroneous. They furnish no basis for this Court to permit the judgment for a sum greatly in excess of the prescribed ceiling rates under the Natural Gas Act to stand.

We remind this Court that Respondents have never filed a rate change, and that the issues of the Federal Energy Regulatory Commission's obligation to exercise jurisdiction and of whether Respondents' sales contract contains

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[3] The Commission never interpreted the contract because it deferred the exercise of its jurisdiction to permit the Louisiana state courts to construe in the first instance this aspect of the pricing provision of Respondents' contract. Respondents subsequently argued before the Commission, as they have here, that the state courts had interpreted their contract as providing for a price for dry gas and a separate price for the products removed from the gas. The January 22, 1980, judgment clearly disproves Respondents' reading of the prior state court opinions. This matter was recently brought to the attention of the Federal Energy Regulatory Commission in connection with the parallel proceeding pending in Docket No. RI76-28.

[4] Again this matter is also pending before the Commission in connection with Respondents' waiver application.

a rate escalation provision which has been activated are still pending in the petition for certiorari in No. 78-1789.[5]

We are not familiar with any decision of the Federal Energy Regulatory Commission or of its predecessor, the Federal Power Commission, or of the federal courts, in which the Commission has waived the requirement of Section 4 of the Natural Gas Act that a change in rate be filed, and that the Commission authorize the new rate to take effect without construing the contract and holding that the rate change provided by the contract is fair and reasonable. Respondents' application for waiver blurs the distinction between a waiver of the rate change filing requirement of Section 4 and a waiver of the requirement that notice of the change be given to the Commission and the public. If, in the present case the Commission should waive the notice requirement, *Respondents would still be under the legal necessity of filing a rate change and the Commission would have to pass on whether the rate change was authorized by the contract and was fair and reasonable. Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Northern Natural Gas Co.* v. *Kansas Corporation Commission*, 372 U.S. 84 (1963); *Ashland Oil & Refining Co.* v. *F.P.C.*, 421 F.2d 17 (6th Cir. 1970); *Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692, 695 (5th Cir. 1962), *cert. den.* 371 U.S. 887 (1962); *Atlantic Richfield Co.* v. *Northern Natural Gas Co.*, No. CA3-76-1548-G (N.D. Tex. December 5, 1977), *appeal docketed*, No. 78-1112 (5th Cir.).[6] The Commission has no authority to waive the statutory filing requirement of the Natural Gas Act. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra.*

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[5] Moreover, the denial of certiorari in No. 78-986 (October 1, 1979) occurred at an interlocutory stage of these proceedings so that it need not and should not be treated as a final adjudication of this issue. *Hughes Tool* v. *TransWorld Airlines*, 409 U.S. 363 (1973); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assoc.*, —— U.S. ——, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

[6] See Appendix p. 1a, Reh. Pet. in No. 78-986.

The decision of the United States Court of Appeals for the District of Columbia Circuit in which it affirmed the Federal Energy Regulatory Commission's order waiving the prospective notice requirements is reported under the title *City of Piqua, Ohio* v. *F.E.R.C.*, 610 F.2d 950 (D.C. Cir. 1979). The following extract from the court's opinion explains that in a proper case *where the Commission has found the new rates to be just and reasonable, and justified by the contract between the parties,* it can, upon showing of good cause, waive the prospective notice requirement, 610 F.2d 950, 954-955:

> "The present situation is immediately distinguishable. In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract. Filing under section 205(d) allowed the Commission to review the agreement to ensure its reasonableness. Such review does not, when good cause is shown, however, preclude enforcing the contract provision as of the date specified therein. Moreover, the Commission in finding the Agreement reasonable, did not retroactively substitute a rate; it merely approved the rate change and effective date agreed upon by the parties.
>
> "As part of its retroactivity argument, Piqua also challenges the waiver as inconsistent with the 'filed rate doctrine' as described in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951): '[a utility] can claim no rate as a legal right that is other than the filed rate . . . .' This court, in discussing the doctrine, stated: 'The considerations underlying the [filed rate] doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the Agency has been made cognizant.' *City of Cleveland* v. *FPC*, 174 U.S.App.D.C. 1, 10, 525 F.2d 845, 854 (1976). This purpose is unaffected by the Commission's waiver of the notice requirement upon good cause, thus allowing rate changes, *found by the Commission to be just and reasonable,* to become effective on the date agreed by the parties." (Emphasis added.)

If the Commission should in this proceeding waive the prospective notice requirement of the Natural Gas Act, it would still be required by law to pass on the interpretation of the favored nation provision and whether the changed rate is (or was) fair and reasonable,[7] and otherwise apply its established rules to any order which might permit the rate to become effective. See *Shell Oil Co.*, 29 F.P.C. 498, 499-500 (1963) (F.P.C. Opinion No. 382); *Independent Oil & Gas Association of W. Virginia, Opinion and Order,* (March 4, 1980), Docket No. RI74-188, *et al.,* (Opinion No. 77).

C.

The remainder of Respondents' brief is a transparent attempt to divert the Court's attention from the unlawful and excessive rate increase issue. Completely outside the record and without any apparent connection with any fact or issue in the suit, Respondents catalogue the financial strengths of Petitioner.[8] Petitioner does not understand

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[7] Petitioner has shown that the rate increases awarded by the state courts, when added to the existing rates, substantially exceed the applicable ceiling rates prescribed by the Commission.

[8] The following examples illustrate Respondents' misstatements: On page 3, footnote 1, they say that during the *14* years 1961-1975 (sic), Petitioner was withholding the true facts from them, it amassed 1 billion dollars in "private corporate assets"; from the Company's published annual reports, it appears that in the *15* years from 1961 to 1975, its assets increased from $228 million to $672 million.

Respondents say that in the period Petitioner "grossed over $5 billion in private corporate earnings" and "reaped over $1 billion in excessive corporate earnings." In the 15-year period, the total of Petitioner's earnings was $415 million, the highest in any year was $49 million and the average was $28 million per year.

Respondents say that in the period Petitioner distributed $275 million in dividends; the actual amount was $215 million, an average of 14¼ million per year. On page 8 Respondents changed their figures somewhat and assert that Petitioner's "own excessive private corporate profits were over $120 million each year" and that it distributed to private stockholders each year "over 35 million dollars," whereas in the 15-year period the highest yearly distribution was $18 million and the average was $14 million.

the relevance of these statements or the point which Respondents seek to make. Petitioner's rates are fully regulated by the Federal Energy Regulatory Commission at the federal level and by the several state utility commissions where Petitioner is involved in intrastate business. Petitioner's rates to its customers have tracked the cost of gas it has paid to Respondents in accordance with the Federal Energy Regulatory Commission's regulations.

Nor is there any perceptible reason in the strategy of Respondents' argument for them to assert, in almost every paragraph of their brief, Petitioner's alleged fraud of concealment from them of the facts of the contract escalation. The Supreme Court of Louisiana held that Petitioner, by failing to inform Respondents of their rights (of which Petitioner knew nothing), had become legally responsible to pay them an additional price for their gas under the escalation provision of their contract; and this, notwithstanding that Petitioner had not been guilty of fraud. That court said:

> "The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud." 368 So.2d 984, 993.

The Louisiana Court of Appeal made a similar finding, saying:

> "The trial court did not make a finding that defendant was guilty of fraudulent concealment, and we find the evidence is insufficient to support such an allegation." 359 So.2d 255, 263-264.

Respondents have printed, as a part of the appendix to their brief, a random selection of letters taken out of the context of the correspondence. These letters were before the Louisiana courts, which absolved Petitioner of any intention to mislead Respondents, together with the corre-

spondence of which they were a part and the testimony of the authors of the letters. While Respondents make no reference to these letters in their brief, it is obvious that they would like them to bolster their insinuations of fraud. This Court, we are sure, does not intend to review here the state courts' findings of fact.[9]

CONCLUSION

Respondents' argument needs only to be understood to be rejected out of hand. Respondents contend that their contract provided for separate prices for dry gas (*i.e.* natural gas after extraction of liquefiable hydrocarbons) and for extracted liquid hydrocarbons and that the Federal Energy Regulatory Commission's ceiling rates apply only to dry gas. Respondents ignore the fact that they have sold no extracted liquids to Petitioner, but rather, under the Court of Appeal's interpretation, have sold wet gas (*i.e.*, gas containing liquefiable hydrocarbons).

When natural gas is produced it contains liquefiable hydrocarbons as part of the wellhead stream. These liquefiable hydrocarbons in their gaseous phase are contained in varying degrees in all natural gas. The Commission's regulations prescribe rates for natural gas and set minimum quality standards. These rates apply to the natural gas whether wet or dry and there is no provision for a higher rate for wet gas. Producers get the same price for wet gas as for dry gas.[10] There is no doubt that the liquefiable hydrocarbons in wet gas can be extracted and sold as a separate product.[11] That, however, was not the case here

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[9] Under this Court's decisions, findings of fact of a state court will be accepted by this Court in the absence of a constitutional issue or other exceptional circumstances; *Evco* v. *Jones*, 409 U.S. 91 (1972).

[10] There is an upward and downward adjustment for gas of higher heat value (Btu content) in some cases. However, that provision does not apply here.

[11] The extraction and processing of liquefiable hydrocarbons involves a substantial economic cost. After processing, however, extracted liquids have an economic value as a separate product in their liquid form.

because Respondents sold wet gas to Petitioner. Respondents' argument that their sale of gas is only partially regulated is directly contrary to the Commission's rate regulations which apply to the *entire* gas stream including liquefiable hydrocarbons. See Petition, pp. 16-22.

The judgment of the Court of Appeal ignores the Commisison's regulations as they apply to a sale of wet gas. Under the judgment Respondents obtain a rate for the sale of wet gas by reference to the market value of extracted liquid hydrocarbons in addition to the price for gas. This rate calculation awards Respondents a rate which is almost twice the *maximum* price permitted by the Commission.

This case presents important questions in the administration of the Natural Gas Act which involve a direct conflict between federal law and the application by state courts of local policy and law, as we pointed out in our petition (p. 23). We do not find in Respondents' brief any effort to address these problems; and surely the state courts should not be permitted to render a judgment in flagrant violation of the Natural Gas Act and price regulations of the Commission.

Respectfully submitted,

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August 1980

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed on behalf of the United States and the Federal Energy Regulatory Commission in response to the Court's invitation of October 6, 1980.

QUESTION PRESENTED

Whether, in calculating damages for a breach of contract, the Louisiana courts permitted the respondents to recover from the petitioner rates for natural gas in excess of applicable rate ceilings established by the Federal Energy Regulatory Commission.

TABLE OF CONTENTS

Page

Statute and regulations involved 1

Statement 1

Discussion 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Arkansas Louisiana Gas Co. v. *Hall*, cert. denied, 444 U.S. 878 (1979), rehearing denied, No. 78-986 (July 2, 1980) 1, 2

Mobil Oil Corp. v. *FPC*, 438 F. 2d 1238 5

Montana-Dakota Utilities Co. v. *Public Service Co.*, 341 U.S. 246 2

Permian Basin Area Rate Cases, 390 U.S. 747 5

Statute and regulations:

Natural Gas Act, Section 4, 15 U.S.C. 717c 1

18 C.F.R. 154.92-154.95 1

18 C.F.R. 154.109a 1

18 C.F.R. 157.40 ..... 1, 2

Miscellaneous:

Opinion No. 742, Docket No. R-393 (Aug. 28, 1975) 4-5

Order No. 428, 45 F.P.C. 454 (1971) 4

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STATUTE AND REGULATIONS INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. 717c, and the Commission's pertinent regulations, 18 C.F.R. 154.92-154.95, 157.40, are set forth in the petition for a writ of certiorari in No. 78-986, at Pet. App. 48a-50a, 52a-60a. The applicable Commission area rates, 18 C.F.R. 154.109a, as added by Opinion No. 607, Docket No. AR67-1, *et al.*, are set forth at Pet. App. 125a.

STATEMENT

This petition is the third arising from contract litigation between respondents and the Arkansas Louisiana Gas Company ("Arkla") before the state courts of Louisiana. The underlying facts of the case are more fully described in our response to the first petition, *Arkansas Louisiana Gas Co.* v. *Hall*, cert. denied, 444 U.S. 878 (1979), rehearing denied, No. 78-986 (July 2, 1980) (Amici Br. 2-10), as supplemented by our response to the second petition, *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789 (Amici Br. 2-6).

Briefly restated, the facts are that in 1952 Arkla and respondents entered into a gas purchase contract, under which Arkla agreed to pay respondents increased rates to match any higher rate that Arkla as a buyer paid to any other "party seller" in the Sligo field of Northern Louisiana. This provision for conditioning a price adjustment is known as a "favored nations clause." After 1954, the Commission issued a certificate permitting respondents to sell gas to Arkla under that contract.

In 1974, respondents sued Arkla in a Louisiana state court for breach of contract, claiming that Arkla was violating the favored nations clause. Specifically, respondent alleged that in 1961 Arkla had leased certain government owned land in the Sligo field, and that

Arkla's payments to the United States for gas and liquids produced from the leasehold triggered respondents' rights to higher prices under the favored nations clause. Arkla contended that under the doctrine of primary jurisdiction the question whether its lease payments constituted "purchases" within the meaning of the favored nations clause should be decided by the Commission. Both the state courts and the Commission rejected this contention and this Court denied Arkla's petition for certiorari on the question of primary jurisdiction. *Arkansas Louisiana Gas Co.* v. *Hall*, cert. denied, 444 U.S. 878 (1979), rehearing denied, No. 78-986 (July 2, 1980).

The second petition filed by Arkla concerns the period for which respondents are entitled to damages. The state trial and intermediate appellate courts both held that Arkla's payments to the United States after 1961 had triggered the favored nations clause, but that under the "filed rate doctrine" of *Montana-Dakota Utilities Co.* v. *Public Service Co.*, 341 U.S. 246 (1951),[1] the amounts to which respondents were lawfully entitled were limited to the specific rates on file with the Commission and respondents thus could not be awarded any additional amounts based on an alleged breach of contract. The courts further ruled, however, that the filed rate doctrine did not bar respondents from recovering damages for the period after October 1972, when respondents acquired "small producer" status and were no longer required to file rate schedules with the Commission.[2] The Louisiana

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[1]Under that doctrine a regulated company may collect for particular sales only the rates contained in its Commission rate schedules for the period in question. "It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Public Service Co.*, *supra*, 341 U.S. at 251.

[2]A "small producer" is defined in the Commission's regulations as an independent natural gas producer whose total sales in certain categories do not exceed 10 million Mcf per year. 18 C.F.R. 157.40.

Supreme Court reversed in part, concluding that, notwithstanding the filed rate doctrine, respondents should be permitted to recover damages from 1961 because Arkla had prevented respondents from filing increased rates with the Commission by not informing respondents of its lease payments.

Arkla then sought review in this Court of the Louisiana Supreme Court's decision. *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789. In response to the Court's invitation, we filed a brief expressing the view that the ruling of the Louisiana Supreme Court was incorrect and contrary to the filed rate doctrine. We also advised the Court that the Commission had under consideration an application by respondents for a waiver of the Commission's filing requirements. In a supplemental memorandum in No. 78-1789, we have informed the Court that the Commission has voted to deny respondent's application for a waiver and we have recommended that the Court grant Arkla's petition for a writ of certiorari in that case and reverse the judgment of the Louisiana Supreme Court.

While these other matters were pending, the state trial court was in the process of making a definitive calculation of the amount of damages Arkla owed to respondents. The trial court denied Arkla's motion to introduce evidence that allegedly showed that respondents' damage claims, if upheld, would result in Arkla's paying rates in excess of those authorized by the Commission (Pet. 10; Pet. App. 134a-142a). The Louisiana Court of Appeal affirmed the trial court's award of damages (Pet. App. 105a-117a). The court rejected Arkla's contention that the award exceeded the Commission's maximum ceiling rates, relying on previous statements by the Louisiana Supreme Court and the Commission that the damages awarded to respondents fell within the area ceiling rates prescribed by the Commission (*id.* at 116a). The Louisiana Supreme Court denied review and Arkla filed this petition.

DISCUSSION

1. Arkla contends that the damages awarded to respondents have caused respondents' rates for gas to exceed applicable ceiling rates established by the Commission. The decision of the Louisiana Court of Appeal rejecting Arkla's contention is based in part on the Commission's conclusion, in its order refusing to exercise primary jurisdiction, that "the damages do not exceed applicable area ceiling rates" (78-986 Amici Br. App. 13a; 78-1789 Amici Br. App. 13a). Upon careful reexamination of the information available to it, the Commission has determined that its earlier conclusion was based on an incorrect understanding of the contract between Arkla and respondents that is involved in this case. At the present time the Commission is unable to determine conclusively whether its ceiling rates have been exceeded as a result of the damages awarded to respondents. Accordingly, further proceedings are necessary and, to that end, we submit that the judgment of the Louisiana Court of Appeal should be vacated and the case remanded to the Louisiana courts. If that course is followed, the Commission would assist in reaching a determination whether the present damage awards exceed the permissible ceiling rates.

2. In 1971, the Commission ruled that small producers with favored nations clauses could not receive rates in excess of the Commission's ceiling rates for large producers. Order No. 428, 45 F.P.C. 454, 455 (1971). Consequently, as all parties to this case appear to agree, respondents may recover damages under the favored nations clause only to the extent that those damages do not cause the rates Arkla must pay for respondents' gas to exceed the appropriate ceiling rates[3] in Northern

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[3]In 1975 the Commission modified its earlier rule to permit small producers with favored nations clauses to collect up to 130% of the large producer ceiling rates. Opinion No. 742, Docket No. R-393, at

Louisiana. Those maximum rates are set forth in Commission Opinion No. 607 (Pet. App. 125a-133a).

This limitation, of course, applies only to products within the Commission's jurisdiction. Gas may be sold at the mouth of the well (the wellhead) or after the removal of liquids or other impurities at processing plants. At the wellhead, the Commission has jurisdiction over the entire gas stream, including those molecules later processed into liquids. See *Mobil Oil Corp.* v. *FPC*, 483 F. 2d 1238, 1248 n.123 (D.C. Cir. 1973), citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 820 n.111 (1968). With respect to sales at the plant, however, once liquids have been extracted the Commission's authority extends only to the gas itself (*i.e.*, the residue gas).

The Commission's previous conclusion (78-986 Amici Br. App. 13a; 78-1789 Amici Br. App. 13a) that "the damages does not exceed applicable area ceiling rates," was premised upon the erroneous belief that Arkla's contract with respondents was based on sales at the plant, and not at the wellhead. As a result of this incorrect interpretation, the Commission eliminated from its calculations those damages that apparently represented payment for removable liquids, and found that the damages awarded for the actual gas (*i.e.*, residue gas) were within the area ceiling rates. That premise is now undermined by the ruling of the Louisiana courts (Pet. App. 116a-117a) that Arkla's contract with respondents provided for sales of the entire gas stream at the wellhead, including removable liquids.

6-7 (Aug. 28, 1975). Thus, for the period between August 28, 1975, and December 31, 1975, respondents were entitled to 130% of the large producer area rate for Northern Louisiana.

Thus, for purposes of applying the Commission's ceiling, damages must be considered on the basis of wellhead sales. Upon review of the available data, the Commission is presently unable to determine whether the damages awarded have caused respondents' rates to exceed permissible levels. We therefore recommend that the case be remanded to the Louisiana courts to permit the parties to present additional evidence on this question.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Louisiana Court of Appeal should be vacated, and the case should be remanded to the state courts for further proceedings to determine whether, in calculating damages, the Louisiana courts permitted respondents to recover rates for natural gas exceeding the Commission's applicable rate ceilings.

Respectfully submitted.

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